

# EDITOR'S NOTE

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No. 83-1968-ATX  
Status: GRANTED

Title: Lacy H. Thornburg, et al., Appellants  
v.  
Ralph Gingles, et al.

Docketed:  
June 2, 1984

Court: United States District Court for the  
Eastern District of North Carolina

Counsel for appellant: Leonard Jerris, Thornburg, Lacy H.

Counsel for appellee: Guinier, Lari, Donaldson, Arthur J.,  
Foster, Charles Allen, Chambers, Julius L.

Entry	Date	Note	Proceedings and Orders
1	Mar 26 1984	Application for extension of time to docket appeal and order granting same until June 2, 1984 (Chief Justice, March 24, 1984).	
2	Jun 2 1984	G Statement as to jurisdiction filed.	
3	Feb 14 1984	Application for stay filed.	
4	Feb 15 1984	Response requested - Due Feb. 21, 1984.	
5	Feb 21 1984	Response received.	
6	Feb 24 1984	Application for stay denied by Burger, C.J.	
7	Feb 27 1984	Above application refiled with Powell, J.	
8	Mar 5 1984	Application for stay DENIED by order of the Court. Justice Marshall OUT.	
10	Jun 19 1984	Order extending time to file response to jurisdictional statement until August 3, 1984.	
11	Jun 19 1984	ABOVE EXTENSION OF TIME APPLIES TO ALL APPELLEES'.	
13	Jul 23 1984	Order extending time to file response to jurisdictional statement until August 15, 1984.	
14	Aug 6 1984	Motion of appellees Ralph Gingles, et al. to dismiss or affirm filed.	
15	Aug 22 1984	DISTRIBUTED. September 24, 1984	
16	Oct 1 1984	P The Solicitor General is invited to file a brief in this case expressing the views of the United States.	
17	Apr 10 1985	Brief amicus curiae of United States filed.	
18	Apr 10 1985	REDISTRIBUTED. April 26, 1985	
19	Apr 22 1985	X Supplemental brief of appellees Ralph Gingles, et al. filed.	
20	Apr 23 1985	X Supplemental brief of appellees intervenors filed.	
21	Apr 29 1985	PROBABLE JURISDICTION NOTED. limited to questions I and II presented by the statement as to jurisdiction. ***** DEFERRED APPENDIX METHOD.	
23	May 10 1985		
25	May 20 1985	Order extending time to file brief of appellant on the merits until July 8, 1985.	
26	Jul 3 1985	Brief of appellants Lacy H. Thornburg, et al. filed.	
27	Jul 5 1985	Brief amicus curiae of Washington Legal Foundation filed.	
28	Jul 8 1985	Application for leave to file brief, amicus curiae, in excess of page limitations, and order granting same not to exceed 35 pages, by Burger, C.J., on July 9, 1985.	
29	Jul 8 1985	Application filed by the Solicitor General. (A-18).	
30	Jul 8 1985	Brief amicus curiae of United States filed.	
31	Jul 12 1985	G Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.	

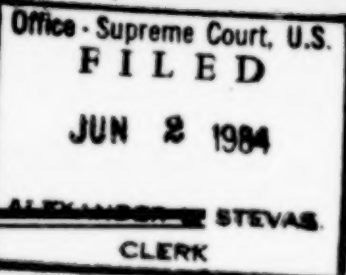


Entry	Date	Note	Proceedings and Orders
33	Jul 11 1985		Order extending time to file brief of appellee on the merits until August 30, 1985.
34	Jul 8 1985		Application by acting S.C. to file amicus curiae brief in excess of page limitations filed, and order granting same by Burger, C.J., on 7/9/85, not to exceed 35 pages.
35	Jul 8 1985		Motion of Legal Services of North Carolina for leave to file a brief as amicus curiae filed.
36	Aug 29 1985	G	
37	Aug 28 1985		Application for leave to file the appellees' brief on the merits in excess of the page limitation filed (A-169), and order granting same by Brennan, J., on Aug. 29, 1985. The brief may not exceed 135 pages.
38	Aug 28 1985		
39	Aug 30 1985		Brief amicus curiae of Republican National Committee filed.
40	Aug 30 1985	G	Motion of Dennis DeConcini, et al. for leave to file a brief as amici curiae filed.
41	Aug 30 1985	G	Motion of Common Cause for leave to file a brief as amicus curiae filed.
42	Aug 30 1985		Brief of appellees Paul B. Eaglin, et al. filed.
43	Aug 30 1985	G	Motion of American Civil Liberties Union Foundation, Inc., et al. for leave to file a brief as amici curiae filed.
45	Sep 5 1985		Brief of appellees Ralph Gingles, et al. Printed Oct. 2 filed.
46	Aug 30 1985	G	Motion of James G. Martin, Governor of North Carolina, for leave to file a brief as amicus curiae filed.
47	Sep 18 1985		Motion of the Acting Solicitor General for leave to participate in GRANTED.
48	Sep 20 1985	G	Motion of appellants and appellees for leave to file oversized portion of joint appendix filed.
50	Sep 24 1985		DISTRIBUTED, Sept. 30, 1985. (Motion of appellants & appellees for leave to file oversized portion of jt. appx)
51	Sep 21 1985		Appendix Joint appendix and Vol. 1 of Exhibits filed.
53	Oct 7 1985		Motion of Legal Services of North Carolina for leave to file a brief as amicus curiae GRANTED.
54	Oct 7 1985		Motion of Dennis DeConcini, et al. for leave to file a brief as amici curiae GRANTED.
55	Oct 7 1985		Motion of Common Cause for leave to file a brief as amicus curiae GRANTED.
56	Oct 7 1985		Motion of American Civil Liberties Union Foundation, Inc., et al. for leave to file a brief as amici curiae GRANTED.
57	Oct 7 1985		Motion of James G. Martin, Governor of North Carolina, for leave to file a brief as amicus curiae GRANTED.
58	Oct 7 1985		Motion of appellants and appellees for leave to file oversized GRANTED.
59	Oct 7 1985		Joint appendix filed.
60	Oct 17 1985		UNFILED.
61	Oct 22 1985		SET FOR ARGUMENT, Wednesday, December 4, 1985. (1st case).
62	Nov 22 1985	X	Reply brief of appellant filed.
63	Dec 4 1985		ARGUED.

Entry	Date	Note	Proceedings and Orders
64	Dec 7 1985		Letter from Julius L. Chambers, Counsel for appellees distributed.

83-1968

No. \_\_\_\_\_



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

RUFUS L. EDMISTEN, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

On Appeal From The United States District Court  
For The Eastern District Of North Carolina

**JURISDICTIONAL STATEMENT**

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**QUESTIONS PRESENTED**

- I. Whether Section 2 of the Voting Rights Act guarantees protected minorities the right to safe electoral districts wherever there occurs a sufficient concentration of minority citizens to create at least one safe black district which ensures black electoral success.
- II. Whether preclearance of a redistricting plan under Section 5 of the Voting Rights Act precludes relitigation of the issue of discriminatory result of that plan by private plaintiffs under Section 2.
- III. Whether racial bloc voting exists as a matter of law whenever less than 50% of the white voters cast ballots for the black candidate.
- IV. Whether the court erred in rejecting substantial evidence that many black leaders were satisfied that electoral access and opportunity for blacks and whites were equal and furthermore, opposed the concept of single member districts advocated by the plaintiffs.



### PARTIES TO THE PROCEEDING BELOW

The Appellants, defendants in the action below, are as follows: Rufus Edmisten, Attorney General of North Carolina; James C. Green, Lieutenant Governor of North Carolina; Liston B. Ramsey, Speaker of the House; The State Board of Elections of North Carolina; R. Kenneth Babb, John L. Stickley, Ruth Semashko, Sydney F.C. Barnwell, and Shirley Herring, members of the State Board of Elections; and Thad Eure, Secretary of State.

The Appellees, plaintiffs in the action below, are as follows: Ralph Gingles, Sippio Burton, Fred Belfield, and Joseph Moody, on behalf of themselves and all others similarly situated.

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IN THE  
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OCTOBER TERM, 1983

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RUFUS L. EDMISTEN, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

\_\_\_\_\_  
**On Appeal From The United States District Court  
For The Eastern District Of North Carolina**  
\_\_\_\_\_

**JURISDICTIONAL STATEMENT**  
\_\_\_\_\_

**OPINIONS BELOW**

The opinion of the United States District Court for the Eastern District of North Carolina in this case was rendered on January 27, 1984. A copy of the Court's Opinion and Order is set out in Appendix A.

**JURISDICTION**

The case below was a class action by black voters of North Carolina challenging certain multi-member districts in the post-1980 redistricting of the North Carolina General Assembly. The appellants filed their Notice of Appeal in the District Court on February 3, 1984, a copy of which is contained in Appendix B. This appeal is docketed in this Court within the time allowed by order of the Chief Justice, dated March 28, 1984. A copy of this order



is set forth in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

#### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fifteenth Amendment, and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c are set out in Appendix D.

#### STATEMENT OF THE CASE

In July of 1981, the North Carolina General Assembly enacted a legislative redistricting plan in order to conform the State Senate and House of Representative districts to the 1980 census. In keeping with a 300 year old practice in the State, the plans consisted of a combination of single member and multimember districts and each district was composed of either a single county or two or more counties so that no county was divided between legislative districts. The Plaintiffs below filed this action on September 16, 1981 in the United States District Court for the Eastern District of North Carolina alleging among other things, that the multi-member districts diluted black voting strength.

In October 1981, in a special session, the General Assembly repealed and reworked the House plan to reduce the population deviations. Because forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act, the revised House plan and the Senate plan were submitted to the Attorney General for review. The Attorney General interposed objections to both proposals. He found that the state policy against dividing counties resulted in the creation of multi-member districts which in turn tended to submerge black voters in the covered counties.

During the early months of 1982 counsel for the General Assembly worked closely with the Civil Rights Division of the Department of Justice in order to remedy those aspects of the plans found objectionable under Section 5. In February, the General Assembly enacted new redistricting plans in which some county lines were broken in order to overcome the objection in the covered counties of the State. When these plans were submitted, the Attorney General found one problematic district in each plan. These subsequently were redrawn to Justice Department specifications. On April 30, 1982, the Senate and House plans received Section 5 preclearance.

The action below remained pending during the course of these legislative proceedings, and several amendments to the complaint were permitted to accommodate the successive revisions of the redistricting plans. The last supplemental complaint included Section 2 of the Voting Rights Act, as amended on June 29, 1982, as a basis of the plaintiffs' claim of vote dilution. In its final form, the complaint alleged that in 5 General Assembly districts, the use of multi-member configurations diluted the voting strength of black citizens in violation of Amended Section 2. In addition, the plaintiffs alleged vote dilution in another instance where a concentration of black voters was split between 2 Senate districts. The plaintiff class was certified and trial to a three-judge court was held for 8 days commencing July 25, 1983.

The plaintiffs attempted to prove that multi-member House districts in Durham, Forsyth, Mecklenburg and Wake counties, and the multi-member Senate district that included Mecklenburg County, none of which were covered by Section 5, violated Section 2. They also attacked 2 district configurations in the covered area of the State: House district 8 and Senate district 2.

The record reflects the following stipulated facts: Durham County was a 3-member House district which had a black voting age population of 33.6%. Durham has had one black representative to the House continuously since 1973. Two of its five county commissioners are black as are two of its four elected district court judges. The Durham County Board of Elections had a black member from 1970 to 1981. The chairmanship of the Durham County Democratic Party was held by a black from 1969 through 1979 and is currently held by a black for the 1983-85 term.

The black voting age population of Mecklenburg is 24%. Currently one of the eight House members from Mecklenburg County is black. James D. Richardson, who is also black and was running in his first election for public office in 1982, came in ninth in a race for eight seats, with only 250 votes less than the eighth successful candidate. This was in a field of 18 candidates. While there is currently no black senator from the Mecklenburg-Cabarrus County Senate District, James Polk, a first time candidate for public office, ran fifth in a race for four seats in the 1982 election. The Mecklenburg-Cabarrus County Senate District did have a black senator for three terms from 1975 through 1980, until his death before the 1980 elections. In addition, one of the five Mecklenburg County Commissioners, two of the nine Charlotte-Mecklenburg Board of Education members, and one of the ten Mecklenburg County District Court judges, all of whom are black, were elected at-large. In addition, another black was appointed to a vacant district court judgeship in Mecklenburg County, but has not yet had to run for election. One of the three Mecklenburg County Board of Elections members, the current chair, and the immediate past chair of the Mecklenburg County Democratic Executive Committee, are also black.

The City of Charlotte, located in Mecklenburg County, has a population which is 31% black. Harvey Gantt, who is black, currently serves as Mayor of that city. Charlotte also has two black city council members elected from majority black districts.

The five-member House District 39, including most of Forsyth County has a 22% black voting age population and currently has two black representatives as a result of the 1982 elections. Forsyth County has previously elected a black representative for the 1974-76 and 1977-78 General Assemblies. Blacks have also been appointed by the Governor on two occasions to represent Forsyth County in the North Carolina House. This occurred in 1977 when a black representative resigned and again in 1979 when a white representative resigned. One of the five Forsyth County Commissioners and one of the eight Forsyth County School Board members are black. Both Boards are elected at-large. In addition, one of the three members of the Forsyth County Board of Elections is black.

The City of Winston-Salem, located in Forsyth County, has a black population of slightly more than 40% and a black voter registration of slightly less than 32%. The Winston-Salem City Council has eight members elected from wards. Currently, there are three black members elected from majority black wards and one black member elected from a ward with slightly less than 39% black voter registration. The black member defeated a white Democratic incumbent in the primary and a white Republican in the general election.

The current Wake County six member House delegation includes one black member, Dan Blue, who is serving his second term. In the last election, Blue received the highest vote total of the 15 Democrats running in the



primary and the second highest vote total of the 17 candidates running for the six seats in the general election. Although no single-member black Senate district can be constructed in Wake County, Wake elected a black Senator for the 1975-76 and 1977-78 terms.

One of the seven Wake County Commissioners is black. Two of the eight Wake County District Court Judges are black. The Sheriff of Wake County, John Baker, is black and is currently serving his second term. In the 1982 election for his second term, Baker received 63.5% of the votes in the general election over a white opponent. In the Democratic Primary, Baker received over 61% of the vote in defeating two white opponents. Wake County Commissioners District Court Judges, and the Sheriff are all elected at large. According to 1980 figures, 20.5% of the Wake County voting age population are black. Wake County has also had a black member continuously on its three-member Board of Elections since 1977, and the current chair is black.

Despite these stipulated facts, the court below found that the multimember districts in Durham, Forsyth, Mecklenburg and Wake Counties violated Section 2. The court was able to reach this conclusion because it never addressed the ultimate issue of fact posited by the statute—whether black citizens of these districts had equal access to the political process and equal opportunity to elect candidates of their choice. Rather, the court ignored the statutory language and construed the legislative history.

The Report of the Senate Committee on the Judiciary lists nine factors which the Committee suggested might be indicative of vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 28. These factors were culled from the analytical frameworks in *White v. Register*, 412 U.S. 755

(1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1974). The Senate Report makes clear that these factors are merely illustrative of the kinds of evidence a court could consider. No matter how many of these factors a plaintiff proves he must still establish that the challenged electoral mechanism, in the totality of circumstances, results in a denial of electoral access. Because the court below mechanistically applied the factor analysis of the Senate Report without ever relating the evidence to political access in the particular circumstances in this case, the court reached the untenable conclusion that Section 2 was violated even though, "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina." App. at 37a.

#### THE QUESTIONS PRESENTED ARE SUBSTANTIAL

##### I. Section 2 Of The Voting Rights Act Guarantees Access To The Political Process Not Electoral Success Wherever There Occurs A Sufficient Concentration Of Black Citizens To Create At Least One Safe Black District.

On June 29, 1982 Congress enacted amendments to the Voting Rights Act of 1965. Foremost among the changes adopted was a complete transformation of Section 2. Prior to this 1982 amendment, Section 2 had been viewed as simply the statutory restatement of the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55 (1981). Consistent with this Court's rulings, in such cases as *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977), it was necessary to prove both disparate impact and discriminatory intent in order to establish a violation of the Fifteenth Amendment and consequently, of Section 2. This was holding of the plurality of the Court in *City of Mobile*, *supra*.



Section 2(a) as amended provides that no voting law shall be imposed or applied in a manner which results in a denial or abridgement of the right to vote on account of color. Subsection (b) in its entirety reads:

- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973.

By the new language, Congress sought to relieve plaintiffs of the burden of proving discriminatory intent. Under the new Section 2, a plaintiff must show that the challenged election law or practice "results" in unequal access to the political process.

The legislative history of the 1982 amendments to the Voting Rights Act is in many ways internally inconsistent and self-contradictory, in part, because no conference committee report was produced, and the manner in which divergent views of the House and Senate Committee members were compromised was not recorded. One theme, however, is echoed by both Committees and in fact by nearly everyone who commented during the floor debates: Congress intended to codify the standard established by the Supreme Court in *White v. Register*, 412

U.S. 755, (1973). See S.Rep. No. 97-417 (97th Cong. 2d. Sess.) at 32-24; H.Rep. No. 97227 (97th Cong. 1st Sess.) 1981 at 30. In regard to the language ultimately adopted, the Senate Report states that "the substitute amendment codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and the extensive case law which developed around it, into the application of Section 2." S.Rep. at 32.

The district court erred in failing to apply Section 2 in a manner consistent with the judicial precedents expressly identified by Congress. Although the court acknowledged Congress' reliance on *White v. Register*, and some of its progeny, it did not seriously attempt to integrate the language of Section 2 with the case law which Congress sought to codify. Much of the language of subsection (b) of the statute came directly from this Court's opinion in *White*. 412 U.S. at 766.<sup>1</sup> Obviously, it is only in light of the *White v. Register* and the cases which followed that Section 2 can be properly construed. Because the district court attempted to interpret the amended provision without this essential judicial background, it reached several erroneous conclusions of law.

First, the district court erred by equating a violation of Section 2 with the absence of guaranteed proportional representation. The court flatly stated that the essence of a vote dilution claim is this:

[A] racial minority with distinctive group interests that are capable of aid or amelioration by govern-

<sup>1</sup> "The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766.

ment is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior. (citation omitted). App. at 14a.

This statement epitomizes the district court's reading of the amended statute. Although blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats that *numbers alone would presumptively give them*, (i.e. in proportion to their presence in the population) the court found that Section 2 had been violated. All of the vote dilution cases prior to *City of Mobile* run counter to this interpretation. In *David v. Garrison*, for example, the Fifth Circuit wrote that "dilution occurs when the minority voters have no real opportunity to participate in the political process." 553 F.2d 923, 927 (5th Cir. 1977). And in *Dove v. Moore*, the Eighth Circuit in discussing vote dilution under the pre-*Mobile* constitutional standard now codified in Section 2, stated that the "constitutional touchstone is whether the system is open to full minority participation not whether proportional representation is in fact, achieved." 539 F.2d 1152, 1154 (8th Cir. 1976).

The court further misinterpreted the new statute by blurring the clear distinction between effective representation and representation by a member of one's own race. Nothing in the record supports a conclusion that the black residents of the districts at issue have been denied representation in the halls of the General Assembly. The district court, however, based its decision, in part, on the premise that Section 2 guarantees black citizens the right to elect black legislators, at least whenever a sufficient number of blacks is concentrated so as to allow the construction of a safe black single member district around them.

Numerous pre-*City of Mobile* dilution cases strongly refute such a presumption. In *Hendrix v. Joseph* the Fifth Circuit explained that the *Zimmer* factors are designed "to test whether an at-large system has made elected officials so secure in their positions and has made the black vote so unnecessary to success at the polls" that black participation in government is ignored and governmental services to the black community are withheld. 559 F.2d 1265, 1269 (5th Cir. 1977). See also, *David v. Garrison*, 553 F.2d 923, 927. Since the amendment of Section 2, a federal district court in Texas made this pronouncement: "There is simply no right—statutory or constitutional—to be represented by a member of a particular race." *Seamon v. Upham*, No. P-81-49 C.A. (E.D. Tex. Jan. 30, 1984).

The court below struck down the multi-member districts at issue because there was no *guarantee* that blacks would always be elected to the General Assembly from those districts. The court not only presumed that protected minorities have a right to elect members of their own race, it also assumed that the right must be guaranteed by safe black voting-majority districts in which black candidates would always be successful as long as black residents vote as a bloc. This was clearly not the intent of Congress.<sup>2</sup> Other lower federal courts, however, have also adopted erroneous constructions of Section 2 because they have relied on isolated segments of the legislative history and ignored the judicial wisdom which informed

<sup>2</sup> Senator Dole, one of the sponsors of the compromise bill explained that, "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." S. Rep. at 193. See also, *Smith v. Winter*, 717 F.2d 191 (5th Cir. 1983) at 192.



the statutory language. See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. Mar. 2 1984). It is incumbent upon this Court to properly interpret this important legislation.

**II. Preclearance Of A Redistricting Plan Under Section 5 Precludes Readjudication Of The Issue Of Discriminatory Result Of That Plan By Private Plaintiffs Under Section 2.**

Two of the districts challenged by the plaintiffs and found to violate Section 2 consisted of counties covered by Section 5 of the Voting Rights Act: House District 8, a 4-member seat comprised of Nash, Wilson and Edgecombe counties and Senate District 2 which included Northampton, Hertford, Gates, Bertie, Chowan and segments of 4 other counties. The plaintiffs claimed that the multimember configuration in District 8 diluted the black voting potential in that district. As to Senate District 2, the plaintiffs contended that a black concentration sufficient to create a safe black district was split between District 2 (55.1% black) and District 6 (46% black).

Pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, North Carolina must submit any change in its voting laws or practice prior to implementation, to federal authorities. The scope of federal review, however, is limited to those 40 counties which are specifically covered by application of the formula in Section 4(a) of the Act. Accordingly, the State of North Carolina submitted to the Attorney General Chapters 1 and 2 of the Session Laws of the Second Extra Session (the final amended House and Senate redistricting plans).

Under Section 5, the covered State or subdivision has the burden of proving, either by a submission to the Attorney General or by an action for declaratory judg-

ment, that the proposed enactment does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race. The revised Section 2 places the burden on the plaintiff to prove that the challenged law has a discriminatory result. Insofar as Section 5 requires the *State* to meet the burden of proving the absence of both discriminatory purpose and effect, Section 5 necessarily presents a more stringent test for the covered jurisdiction than Section 2.

The legislative history of the recent amendment of Section 2 bears this out. In its Report, the House Committee on the Judiciary expressed its concern that the then-current version of Section 2 required proof of discriminatory purpose while a violation of Section 5 required only discriminatory effect. H. Rep. No. 97-227 (97th Cong. 1st Sess.) at 28. In the Committee's view, Section 2 had to be revised so as to apply essentially the same "effects" standard to non-covered jurisdictions. The lawfulness of a voting law should not depend, the Committee stated, on whether the jurisdiction which implements it, is covered or non-covered.

Similarly, in the Senate Report, the point was also made that Section 5 preclearance would preclude a subsequent finding of violation under Section 2. Rep. No. 97-417 at 35. The Committee had set out to refute the findings of the Subcommittee that identified many cities including Savannah, Georgia, as vulnerable under the new standard. The Senate Judiciary Committee, determined that this finding of the Subcommittee was obviously inaccurate. Savannah had completed an annexation in 1978 which had required preclearance. "After subjecting the proposed annexation to the rigorous requirements of Section 5," the Department of Justice decided that the election system provided black voters with adequate



opportunity for participation and election. S. Rep. No. 97-417 at 35. The Senate Report concluded that insofar as Savannah's city council system had passed muster under Section 5, it would necessarily also meet the requirements of the proposed amendment. *Id.* at 35.

It was apparently the intent of Congress that Section 2 make applicable nationwide the "effects" test contained in Section 5. While uncovered jurisdictions remain unaffected by the Section 5 preclearance requirement, they would be subject to the same test of discrimination when sued by individuals or the Attorney General. In view of the legislative intent, Section 5 has already accomplished the purpose of Section 2 in the covered counties.

By letter dated April 30, 1982 the Attorney General informed the State of North Carolina that he had determined that the reapportionment plans for the North Carolina General Assembly "did not have the purpose and would not have the effect of denying or abridging the right to vote" in the 40 counties covered by Section 5 of the Voting Rights Act. Thus, the issue of the discriminatory purpose and effect of the reapportionment had been authoritatively and conclusively determined in the covered counties, the plaintiffs claim to the contrary, in the court below, notwithstanding.

Administrative preclearance and a declaratory judgment are equal alternatives under Section 5. *Morris v. Gressette*, 432 U.S. 491, (1977). Insofar as the Attorney General's approval has the same legal force as a judgment rendered by the District of Columbia federal court, the granted preclearance had a collateral estoppel effect in this case. "Under the doctrine of collateral estoppel . . . the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of

the first action." *Parklane Hosiery v. Shore*, 439 U.S. 322, (1979) at 326, n.5. All facts necessary to a finding of discrimination under Section 2 were at issue and necessarily determined by the Section 5 procedure. Thus, the Attorney General's decision as to the 40 counties should have precluded relitigation of the same issue by the plaintiffs.

The court below rejected out of hand the appellants' contention that insofar as the State had proven under Section 5 that the redistricting of the covered counties had neither a discriminatory purpose nor effect, a challenge under Section 2 to any precleared districts was precluded. The court found that the preclearance of Senate District 2 and House District 8 was not even probative of the issues before them.

The district court relied for this conclusion solely on the opinion in *Major v. Treen*, 574 F.Supp. 325 (E.D. La. 1983). In that case, plaintiffs mounted a Section 2 challenge to a precleared Congressional district in Louisiana. The Louisiana district court reasoned as follows:

Private plaintiffs are free to mount a *de novo* attack upon a reapportionment plan notwithstanding preclearance. *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n. 9 (5th Cir. 1977). See *Morris v. Gressette*, 432 U.S. 491, 506-07 (1977) ("where the discriminatory character of an enactment is not detected upon review of the Attorney General, it can be challenged in the traditional constitutional [or statutory] litigation.") 574 F.Supp. at 328, n. 1.

Reliance by *Major v. Treen* and the court below on this excerpt from *Morris v. Gressette* is doubly flawed. First of all, the essential language, "or statutory," appears in brackets because the *Major* court simply added it to the actual text of *Morris*. This Court has never held that any

statutory right of action was preserved by Section 5, but rather stated that Section 5 did not preclude a constitutional action in which the plaintiffs had the burden of proving both disparate impact and discriminatory intent. In addition, *Morris v. Gressette* was decided in 1977—long before the amendment of Section 2 and long before a private right of action under the original Section 2 was recognized. The faulty logic of *Major* severely taints the conclusion of the court below regarding the interrelationship of Sections 5 and 2 of the Voting Rights Act.

The sheer absurdity of the district court's ruling that plaintiffs may relitigate issues already disposed of by Section 5 is manifest in the court's discussion of Senate District 2. The court acknowledges that increasing the black percentage in District 2 by adding black residents from the adjacent parts of District 6 would necessarily deplete the influence of those blacks remaining in District 6. Nevertheless, the court ruled that in enacting Section 2, Congress had committed this dilemma "to the judgment of the black community to whom it has given the private right of action under amended Section 2." App. at 52a, n. 33.

The configuration of Districts 2 and 6, however, were precleared by the Attorney General under Section 5. In fact, these districts were designed by counsel and legislative drafters in daily contact with the Assistant Attorney General and members of the staff of the Civil Rights Division. Under Section 5, the Attorney General is specifically charged with representing the black voters of the submitting states. *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982). In the exercise of that obligation the Attorney General determined that it was in the best interests of the black voters not to diminish black in-

fluence in District 6 in order to "pack" District 2. The State followed the suggestions of the Assistant Attorney General in enacting these districts. Now that the State, at great expense and considerable political turmoil, has complied with the wishes of the federal official statutorily charged with representing minority voting interests, it is now ordered by the District court to comply with the wishes of a group of minority voters who apparently disagreed with the Attorney General. This is acutely unfair to the State, especially in light of the fact that the views of the plaintiffs and their counsel were given every consideration by the Civil Rights Division prior to the preclearance.

In light of the large number of Section 2 suits which have been decided or are pending in covered jurisdictions, the preclusive effect of Section 5 on Section 2 litigation must be authoritatively resolved. See, e.g., *Mississippi Republican Executive Committee v. Owen H. Brooks*, No. 83-1722 Jurisdictional Statement filed April 26, 1984.

### III. Racially Polarized Voting Is Not Established As A Matter Of Law Whenever Less Than A Majority Of White Voters Vote For A Black Candidate.

The court accepted the opinion of the plaintiffs' expert that racially polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate.<sup>3</sup> As a result, the court concluded that there

<sup>3</sup> Recently in a denial of a request for rehearing en banc, Judge Higginbotham commented that, "whether polarized voting is present can pivot the legality of at-large voting districts." *Jones v. City of Lubbock*, No. 83-1196 (Fifth Circuit, April 10, 1984). He also expressed serious reservations about the methodology used by experts to analyze polarized voting before the trial court in that case. Judge



was "severe and persistent" racial bloc voting despite the following facts:

a) In the 1982 Mecklenburg House primary, Berry who is black received 50% of the white vote and Richardson who is also black, received 39%. Both black candidates won the primary.

b) In the 1982 House general election for Mecklenburg County, 42% of the white voters voted for Berry; 29% of the whites voted for Richardson. In a field of 18 candidates for 8 seats, 11 white candidates received fewer white votes than Berry. In that election Berry finished second, and Richardson finished ninth, only 250 votes behind the eighth place winner.

c) In the 1982 Senate general election for Durham County, a 3 member seat, Barnes, a black Republican received 17% of the white vote and 5% of the black vote.

d) In the 1982 House general election for Durham County, black candidate Spaulding received 47% of the white vote and won the election.

e) In the 1982 Senate primary election for Mecklenburg County, the black candidate, Polk, received 32% of the white vote and was successful in the primary.

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Higginbotham expressed reservations about the regression model used there to relate the racial makeup of a precinct with the election outcome in that precinct. He noted that the plaintiff's expert "did not test for other explanatory factors than race or ethnicity . . . [such] as campaign expenditure, party identification, media use measured by cost, religion, name identification or distance that a candidate lived from any particular precinct . . . It ignores the reality that race . . . may mask a host of other explanatory variables."

It is interesting to note that the plaintiffs' expert in this case used precisely the same methodology criticized by Judge Higginbotham.

f) In the 1982 Mecklenburg Senate general election, Polk, a black candidate received 33% of the white vote. The leading white candidate received 59% of the white vote.

g) In the 1982 Forsyth House primary, the two black candidates, Hauser and Kennedy, received 25% and 36%, respectively, of the white vote. In a field of 11, Kennedy received more white votes than six of those candidates. Both black candidates won the primary.

h) In the 1982 House general election for Forsyth County, Hauser and Kennedy received 42% and 46% respectively, of the white vote. The successful white candidates received substantially equal support from black and white voters—all within a range between 43% and 63%. Both black candidates were successful.

i) In the 1982 House primary election for Wake County, a six-member district, the only black candidate running, Dan Blue, received more total votes than any other of the 15 candidates. Blue received more white votes than 11 of the other candidates.

j) In the 1982 House general election for Wake County, Blue ran second out of a field of 17 candidates. Blue also received the second highest number of white votes.

k) In the 1982 House primary election for Durham County, one black candidate, Clement, received 32% of the black vote and 26% of the white vote. The black candidate Spaulding received 90% of the black vote and 37% of the white vote. Of the two black candidates, only Spaulding was successful in the primary. Had the black voters wanted to elect Clement, they could have cast double-shot instead of single-shot votes.

1) Finally, of the 11 elected black incumbents who have sought reelection to the General Assembly in recent years, all 11 have won reelection.

In *Rogers v. Lodge*, 458 U.S. 613 (1982), this Court described polarization in terms of its ability to affect election outcomes.

Voting along racial lines allows those elected to ignore black interests without fear of political consequence, and without bloc voting the minority candidates would not lose elections solely because of their race. 458 U.S. at 616.

Racially polarized voting is probative of vote dilution only insofar as it is outcome determinative. In other words, where blacks consistently *lose* elections because no whites or few whites will vote for them, the voting is racially polarized. Where blacks *win* because of bloc voting and single shot voting by blacks, combined with substantial support from whites, then racial polarization does not have any legal significance. See *McMillan v. Escambia County, Florida*, 688 F.2d 960, 966 (5th Cir. 1982); *NAACP v. Gadsden County School Board*, 651 F.2d 978 (11th Cir. 1982).

A candidate is primarily concerned with receiving more votes than his opponents, not with the color of the person who votes for him. Discrete and different voting patterns among racial groups concern the candidate when they operate to prevent him from winning. This political reality lies at the root of Congress' inclusion of polarized voting in Section 2 analysis. The Senate Report explicitly states that "[i]f plaintiffs assert they are denied fair access to the political process in part, *because of* the racial bloc voting context within which the challenged election system works, they would have to prove it." S. Rep. at 34 (emphasis added). The mere presence of different voting

patterns in the white and black electorate does not prove anything one way or the other about the ultimate issue of access to the political process. Insofar as the lower federal courts have viewed racial bloc voting as the "linchpin of vote dilution" (App. A at 43a), it is imperative that this Court formulate a standard by which that condition can be established.

**IV. The District Court Erred In Disregarding Substantial Evidence That Many Black Leaders Were Satisfied That Electoral Access And Opportunity For Blacks And Whites Were Equal And Furthermore Opposed The Concept Of Safe Single-Member Districts Advocated By The Plaintiffs.**

The appellants offered considerable evidence to the three-judge court that showed that many members and leaders of the black community did not support the contentions of the plaintiffs. Several black legislators had opposed the creation of black districts during the legislative drafting and debates. Other state leaders, white and black, testified that black single member districts would destroy the coalitions which had been forged and would resegregate and ghetto-ize the political landscape of the State. Black leaders testified that recent dramatic increases in voter registration among blacks, substantial black influence and leadership in the State Democratic Party, and substantial support for black candidates from the white community exposed the disingenuousness of the plaintiffs' case.

The district court rejected all this evidence as irrelevant to the issues before them based on the following rationale:

Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents



of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition. (footnotes omitted). App. A at 17a-18a.

Nothing in the legislative history supports the court's conclusion that these factors "are not among the circumstances to be considered" in a Section 2 case. App. A at 18a. Certainly Congressional committees received testimony regarding such risks, but neither the Senate Committee Report nor the House Report suggest that such considerations were not germane to an analysis of the totality of circumstances in any particular case. Nor did any of the sponsors of the compromise language ultimately adopted propound this interpretation of Section 2.

This precedent set by the district court must be addressed and corrected. If not, courts will continue, as did the court below, to make findings of fact which are inadequate under Rule 52(a) because they fail to reflect "all the substantial evidence contrary to its opinion." *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. March 2, 1984).

### CONCLUSION

For the reasons stated above the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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## APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

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No. 81-803-CIV-5

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RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

RUFUS L. EDMISTEN, *et al.*

*Defendants.*

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FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

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### ORDER

For the reasons set forth in the Memorandum Opinion of the court filed this day;

It is ADJUDGED and ORDERED that:

1. Chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982 (1982 redistricting plan) are declared to violate section 2 of the Voting rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973, by the creation of the following legislative districts: Senate Districts Nos. 2 and 22, and House of Representatives Districts Nos. 8, 21, 23, 36, and 39.

2. Pending further orders of this court, the defendants, their agents and employees, are enjoined from conducting any primary or general elections to elect members of the State Senate or State House of Representatives to represent, *inter*

*alia*, registered black voters resident in any of the areas now included within the legislative districts identified in paragraph 1. of this Order, whether pursuant to the 1982 redistricting plan, or any revised or new plan.

This Order does not purport to enjoin the conduct of any other primary or general elections that the State of North Carolina may see fit to conduct to elect members of the Senate or House of Representatives under the 1982 redistricting plan, or to elect candidates for any other offices than those of the State Senate and House of Representatives. *See* N.C.G.S. 120-2.1 (1983) Cum. Supp.).

3. Jurisdiction of this court is retained to entertain the submission of a revised legislative districting plan by the defendants, or to enter a further remedial decree, in accordance with the Memorandum Opinion filed today in this action.

4. The award of costs and attorneys fees as prayed by plaintiffs is deferred pending entry of a final judgment, or such earlier date as may be shown required in the interests of justice.

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J. Dickson Phillips, Jr.  
United States Circuit Judge

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W. Earl Britt, Jr.  
Chief United States District Judge

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Franklin T. Dupree, Jr.  
Senior United States District Judge

I certify the foregoing to be a true and correct copy of the Order.

J. Rich Leonard, Clerk  
United States District Court  
Eastern District of North Carolina

By Cherlyn Wells  
Deputy Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

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No. 81-803-CIV-5

---

RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

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*Defendants.*

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FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

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MEMORANDUM OPINION

Before PHILLIPS, Circuit Judge, BRITT, Chief District Judge, and DUPREE, Senior District Judge.

PHILLIPS Circuit Judge:

In this action Ralph Gingles and others, individually and as representatives of a class composed of all the black citizens of North Carolina who are registered to vote, challenge on constitutional and statutory grounds the redistricting<sup>1</sup> plan

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<sup>1</sup> For consistency and convenience we use the term "redistricting" throughout as a more technically, as well as descriptively, accurate one than the terms "apportionment" or "reapportionment" sometimes used by the parties herein to refer to the specific legislative action under challenge here. *See Carstens v. Lamm*, 543 F. Supp. 68, 72 n.3 (D. Col. 1982).



enacted in final form in 1982 by the General Assembly of North Carolina for the election of members of the Senate and House of Representatives of that state's bicameral legislature. Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 1343, and 2284 (three judge court) and on 42 U.S.C. § 1973c.

The gravamen of plaintiffs' claim is that the plan makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts, and that in another area of the state the plan fractures into separate voting minorities a comparable concentration of black voters, all in a manner that violates rights of the plaintiffs secured by section 2 of the Voting Rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973 (Section 2, or Section 2 of the Voting Rights Act), 42 U.S.C. §§ 1981 and 1983, and the thirteenth, fourteenth and fifteenth amendments to the United States Constitution.<sup>2</sup> In particular, the claim is that the General Assembly's plan impermissibly dilutes the voting strength of the state's registered black voters by submerging black voting minorities in multi-member House District No. 36 (8 members - Mecklenburg County), multi-member House District No. 39 (5 members - part of Forsyth County), multi-member House District No. 23 (3 members - Durham County), multi-member House District No. 21 (6 members - Wake County), multi-member House District No. 8 (4 members - Wilson, Edgecombe and Nash Counties), and multi-member Senate District No. 22 (4 members - Mecklenburg and Cabarrus Counties), and by fracturing between more than one senate district in the northeastern section of the state a concentration of black voters sufficient in numbers and con-

<sup>2</sup> The original complaint also included challenges to population deviations in the redistricting plan allegedly violative of one-person-one-vote principles, and to congressional redistricting plans being contemporaneously enacted by the state's General Assembly. Both of these challenges were dropped by amended or supplemental pleadings responsive to the evolving course of legislative action, leaving only the state legislature "vote dilution" claims for resolution.

tiguity to constitute a voting majority in at least one single-member district, with the consequence, as intended, that in none of the senate districts into which the concentration is fractured (most notably, Senate District 2 with the largest mass of the concentration) is there an effective voting majority of black citizens.

We conclude on the basis of our factual findings that the redistricting plan violates Section 2 of the Voting Rights Act in all the respects challenged, and that plaintiffs are therefore entitled to appropriate relief, including an order enjoining defendants from conducting elections under the extant plan. Because we uphold plaintiffs' claim for relief under Section 2 of the Voting Rights Act, we do not address their other statutory and constitutional claims seeking the same relief.

## I

### General Background and Procedural History

In July of 1981, responding to its legal obligation to make any redistrictings compelled by the 1980 decennial census, the North Carolina General Assembly enacted a legislative redistricting plan for the state's House of Representatives and Senate. This original 1981 plan used a combination of multi-member and single-member districts across the state, with multi-member districts predominating; had no district in which blacks constituted a registered voter majority and only one with a black population majority; and had a range of maximum population deviations from the equal protection ideal of more than 20%. Each of the districts was composed of one or more whole counties, a result then mandated by state constitutional provisions adopted in 1968 by amendments that prohibited the division of counties in legislative districting. At the time this original redistricting plan was enacted (and at all critical times in this litigation) forty of North Carolina's one hundred counties were covered by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Section 5, or Section 5 of the Voting Rights Act.).

Plaintiffs filed this action on September 16, 1981, challenging that original redistricting plan for, *inter alia*, its population deviations, its submergence of black voter concentrations in some of the multi-member districts, and the failure of the state to obtain preclearance, pursuant to Section 5, of the 1968 constitutional amendments prohibiting county division in legislative districting.

After this action had been filed, the state submitted the 1968 no-division-of-counties constitutional provisions for original Section 5 preclearance by the Attorney General of the United States. While action on that submission was pending, the General Assembly convened again in special session and in October 1981 repealed the original districting plan for the state House of Representatives and enacted another. This new plan reduced the range of maximum population deviations to approximately 16%, retained a preponderance of multi-member districts across the state, and again divided no counties. No revision of the extant Senate districting plan was made.

In November 1981, the Attorney General interposed formal objection, under Section 5, to the no-division-of-counties constitutional provisions so far as they affected covered counties. Objection was based on the Attorney General's expressed view that the use of whole counties in legislative districting required the use of large multi-member districts and that this "necessarily submerges cognizable minority population concentrations into larger white electorates." Following this objection to the constitutional provisions, the Attorney General further objected, on December 7, 1981, and January 20, 1982, to the then extant redistricting plans for both the Senate and House as they affected covered counties.

In February 1982, the General Assembly again convened in extra session and on February 11, 1982, enacted for both the Senate and House revised redistricting plans which divided some counties both in areas covered and areas not covered by Section 5. Again, on April 19, 1982, the Attorney General interposed objections to the revised districting plans for both

the Senate and House. The letter interposing objection acknowledged some improvement of black voters' situation by reason of county division in Section 5 covered areas, but found the improvements insufficient to permit preclearance. The General Assembly once more reconvened in a second extra session on April 26, 1982, and on April 27, 1982, enacted a further revised plan which again divided counties both in areas covered and areas not covered by Section 5. That plan, embodied in chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982, received Section 5 preclearance on April 30, 1982. As precleared under Section 5, the plan constitutes the extant legislative districting law of the state, and is the subject of plaintiffs' ultimate challenge by amended and supplemented complaint in this action.<sup>3</sup>

During the course of the legislative proceedings above summarized, this action proceeded through its pre-trial stages.<sup>4</sup> Amended and supplemental pleadings accommodating to successive revisions of the originally challenged redistricting plan were allowed. Extensive discovery and motion practice was had; extensive stipulations of fact were made and embodied in pretrial orders. The presently composed three-

<sup>3</sup> The final plan's division of counties in areas of the state not covered by Section 5 was challenged by voters in one such county on the basis that the division violated the state's 1968 constitutional prohibition. The claim was that in non-covered counties of the state the constitutional prohibition remained in force, notwithstanding its suspension in covered counties by virtue of the Attorney General's objection. In *Cavanagh v. B.*, No. 82-545-CIV-5 (E.D.N.C. Sept. 22, 1983), which at one time was consolidated with the instant action, this court rejected that challenge, holding that as a matter of state law the constitutional provisions were not severable, so that their effective partial suspension under federal law resulted in their complete suspension throughout the state.

<sup>4</sup> At one stage in these proceedings another action challenging the redistricting plan for impermissible dilution of the voting strength of black voters was consolidated with the instant action. In *Pugh v. Hunt*, No. 81-1066-CIV-5, also decided this day, we earlier entered an order of the deconsolidation and permitted the black plaintiffs in that action to intervene as individual and representative plaintiffs in the instant action.



judge court was designated by Chief Judge Harrison L. Winter of the United States Court of Appeals for the Fourth Circuit on October 16, 1981. The action was designated a plaintiff class action by stipulation of the parties on April 2, 1982. Following enactment and Section 5 preclearance of the April 27, 1982, Senate and House districting plans, the pleadings were closed, with issue joined for trial on plaintiffs' challenge, by amended and supplemented complaint, to that finally adopted plan.

Following a final pre-trial conference on July 14, 1983, trial to the three-judge court was held from July 25, 1983, through August 3, 1983. Extensive oral and documentary evidence was received. Decision was deferred pending the submission by both parties of proposed findings of fact and conclusions of law, briefing and oral argument. Concluding oral arguments of counsel were heard by the court on October 14, 1983, and a limited submission of supplemental documentary evidence by both parties was permitted on December 5, 1983.

Having considered the evidence, the memoranda of law submitted by the parties, the stipulations of fact, and the oral arguments of counsel, the court, pursuant to Fed.R.Civ.P. 52(a), enters the following findings of fact and conclusions of law, prefaced with a discussion of amended Section 2 of the Voting Rights Act and of certain special problems concerning the proper interpretation and application of that section to the evidence in this case.

## II

### Amended Section 2 Of The Voting Rights Act

From the outset of this action plaintiffs have based their claim of racial vote dilution not only on the fourteenth and fifteenth amendments, but on Section 2 of the Voting Rights Act. As interpreted by the Supreme Court at the time this action was commenced, former Section 2,<sup>5</sup> secured no further

<sup>5</sup> Former Section 2, enacted pursuant to Congress's constitutional enforcement powers, provided simply:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political (footnote continued on next page)

voting rights than were directly secured by those constitutional provisions. To the extent "vote dilution" claims lay under either of the constitutional provisions or Section 2,<sup>6</sup> the requirements for proving such a claim were the same: there must have been proven both a discriminatorily "dilutive" effect traceable in some measure to a challenged electoral mechanism and, behind that effect, a specific intent on the part of responsible state officials that the mechanism should have had the effect. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

While this action was pending for trial and after the ultimately challenged redistricting plan had been enacted and given Section 5 preclearance, Congress amended Section 2<sup>7</sup> in drastic and, for this litigation, critically important respects. In rough summary, the amended version liberalized the statutory vote dilution claim in two fundamental ways. It removed any necessity that discriminatory intent be proven, leaving only the necessity to show dilutive effect traceable to a challenged electoral mechanism; and it made explicit that the dilutive effect might be found in the "totality of the circumstances" within which the challenged mechanism operated and not alone in direct operation of the mechanism.

(footnote continued from previous page)

subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1976).

<sup>6</sup> It is not now perfectly clear—but neither is it of direct consequence here—whether a majority of the Supreme Court considers that a racial vote dilution claim, as well as a direct vote denial claim, lies under the fifteenth amendment and, in consequence, lay under former Section 2. See *Rogers v. Lodge*, 458 U.S. 613, 619 n.16 (1982). It is well settled, however, that such claims lie under the fourteenth amendment, though only upon proof of intent as well as effect. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>7</sup> H.R. 3112, amending Section 2 and extending the Voting Rights Act of 1965, was passed by the House on October 15, 1981. On June 18, 1982, the Senate adopted a different version, S. 992, reported out of its Committee on the Judiciary. The House unanimously adopted the Senate bill on June 23, 1982, and it was signed into law by the President on June 29, 1982. There was no intervening conference committee action.



Following Section 2's amendment, plaintiffs amended their complaint in this action to invoke directly the much more favorable provisions of the amended statute. All further proceedings in the case have been conducted on our perception that the vote dilution claim would succeed or fail under amended Section 2 as now the obviously most favorable basis of claim.<sup>8</sup>

Because of the amended statute's profound reworking of applicable law and because of the absence of any authoritative Supreme Court decisions interpreting it,<sup>9</sup> we preface our findings and conclusions with a summary discussion of the amended statute and of our understanding of its proper application of the vote dilution claim, we may properly rest decision on the amended statute alone and thereby avoid addressing the still subsisting constitutional claims seeking the same relief. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>8</sup> Of course, the direct claims under the fourteenth (and possibly the fifteenth) amendment remain, and could be established under *Bolden* by proof of a dilutive effect intentionally inflicted. But no authoritative decision has suggested that proof alone of an unrealized discriminatory intent to dilute would suffice. A dilutive effect remains an essential element of constitutional as well as Section 2 claims. See Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. W.L. Rev. 689, 737-38 n.318 (1982). Neither is there any suggestion that the remedy for an unconstitutional intentional dilution should be any more favorable than the remedy of discriminatory intent might nevertheless have limited relevance in establishing a Section 2 "results" claim is another matter.

<sup>9</sup> There have, however, been a few lower federal court decisions interpreting and applying amended Section 2 to state and local electoral plans. All generally support the *Major v. Treen*, Civil Action No. 82-1192 Section C (E.D. La. Sept. 23, 1983) (three-judge court); *Rybicki v. State Board of Elections*, No. 81-C-6030 (N.D. Ill. Jan. 20, 1983) (three-judge court); *Thomasville Branch of NAACP v. Thomas County*, Civil Action No. 75-34-THOM (M.D. Ga. Jan. 26, 1983); *Jones v. City of Lubbock*, Civil Action No. CA-5-76-34 (N.D. Tex. Jan. 20, 1983); *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982) (on grant of preliminary injunction).

Section 2, as amended, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Without attempting here a detailed analysis of the legislative history leading to enactment of amended Section 2, we deduce from that history and from the judicial sources upon which Congress expressly relied in formulating the statute's text the following salient points which have guided our application of the statute of the facts we have found.

*First.* The fundamental purpose of the amendment to Section 2 was to remove intent as a necessary element of racial vote dilution claims brought under the statute.<sup>10</sup>

<sup>10</sup> Senator Dole, sponsor of the compromise Senate version ultimately enacted as Section 2, stated that one of his "key objectives" in offering it was to

make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory "results", in which case proof of discriminatory intent or purpose would be neither required, nor relevant. I was convinced of the inappropriateness of an "intent standard"

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This was accomplished by codifying in the amended statute the racial vote dilution principles applied by the Supreme Court in its pre-*Bolden* decision in *White v. Regester*, 412 U.S. 755 (1973). That decision, as assumed by the Congress,<sup>11</sup> required no more to establish the illegality of a state's electoral mechanism than proof that its "result," irrespective of intent, when assessed in "the totality of circumstances" was "to cancel out or minimize the voting strength of racial groups," *Id.* at 765 - in that case by submerging racial minority voter concentrations in state multi-member legislative districts. The *White v. Regester* racial vote dilution principles, as assumed by the Congress, were made explicit in new subsection (b) of Section 2 in the provision that such a "result," hence a violation of secured voting rights, could be established by proof "based on the totality of circumstances . . . that the political processes leading to nomination or election . . . are not equally open to participation" by members of protected minorities. *Cf. id.* at 766.

*Second.* In determining whether, "based on the totality of circumstances," a state's electoral mechanism does so "result" in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in *White v. Regester* and sub-

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as the sole means of establishing a voting rights claim, as were the majority of my colleagues on the Committee.

S. Rep. No. 417, 97th Cong., 2d Sess. 193 (1982) (additional views of Sen. Dole) (hereinafter S. Rep. No. 97-417).

<sup>11</sup> Congressional opponents of amended Section 2 contended in debate that *White v. Regester* did not actually apply a "results only" test, but that, properly interpreted, it required, and by implication found, intent also proven. The right or wrong of that debate is essentially beside the point for our purposes. We seek only Congressional intent, which clearly was to adopt a "results only" standard by codifying a decision unmistakably assumed—whether or not erroneously—to have embodied that standard. See Hartman, *Racial Vote Dilution*, *supra* note 8, at 725-26 & n.236.

sequently elaborated by the former Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). These typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.



While these enumerated factors will often be the more relevant ones, in some cases other factors will be indicative of the alleged dilution.

S. Rep. No. 97-417, *supra* note 10, at 28-29 (footnotes omitted).

*Third.* Congress also intended that amended Section 2 should be interpreted and applied in conformity with the general body of pre-*Bolden* racial vote dilution jurisprudence that applied the *White v. Regester* test for the existence of a dilutive "result."<sup>12</sup>

Critical in that body of jurisprudence are the following principles that we consider embodied in the statute.

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively, *see United Jewish Organization v. Carey*, 430 U.S. 144, 166 n.24 (1977), give it in a voting constituency not racially polarized in its voting behavior. *See Nevett v. Sides*, 571 F.2d 209, 223 & n.16 (5th Cir. 1978). Vote dilution in this sense can exist notwithstanding the relative absence of structural barriers to exercise of the electoral franchise. It can be enhanced by other factors - cultural, political, social, -economic - in which the racial minority is relatively disadvantaged and which further operate to diminish practical political effectiveness. *Zimmer v. McKeithen*, *supra*. But the demonstrable unwillingness of substantial numbers of the ra-

<sup>12</sup> See S. Rep. No. 97-417, *supra* note 10, at 32 ("[T]he legislative intent [is] to incorporate [*White v. Regester*] and extensive case law . . . which developed around it."). See also *id.* at 19-23 (*Bolden* characterized as "a marked departure from [the] prior law" of vote dilution as applied in *White v. Regester*, *Zimmer v. McKeithen*, and a number of other cited federal decisions following *White v. Regester*).

cial majority to vote for any minority race candidate or any candidate identified with minority race interests is the linchpin of vote dilution by districting. *Nevett v. Sides*, *supra*; see also *Rogers v. Lodge*, 458 U.S. 613, 623 (1981) (emphasizing centrality of bloc voting as evidence of purposeful discrimination).

The mere fact that blacks constitute a voting or population minority in a multi-member district does not alone establish that vote dilution has resulted from the districting plan. *See Zimmer*, 485 F.2d at 1304 ("axiomatic" that at-large and multi-member districts are not *per se* unconstitutional). Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population. *Id.* at 1305.<sup>13</sup>

On the other hand, proof that blacks constitute a population majority in an electoral district does not *per se* establish that no vote dilution results from the districting plan, at least where the blacks are a registered voter minority. *Id.* at 1303. Nor does proof that in a challenged district blacks have recently been elected to office. *Id.* at 1307.

Vote dilution in the *White v. Regester* sense may result from the fracturing into several single-member districts as well as from the submergence in one multi-member district of black voter concentrations sufficient, if not "fractured" or "submerged," to constitute an effective single-member district voting majority. *See Nevett v. Sides*, 571 F.2d 209, 219 (5th Cir. 1978).

*Fourth.* Amended Section 2 embodies a congressional purpose to remove all vestiges of minority race vote dilution perpetuated on or after the amendment's effective date by state or local electoral mechanisms.<sup>14</sup> To accomplish this, Con-

<sup>13</sup> This we consider to be the limit of the intended meaning of the disclaimer in amended Section 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

<sup>14</sup> Both the Senate and House Committee Reports assert a purpose to forestall further purposeful discrimination that might evade remedy under (footnote continued on next page)



gress has exercised its enforcement powers under section 5 of the fourteenth and section 2 of the fifteenth amendments<sup>15</sup> to create a new judicial remedy by private action that is broader in scope than were existing private rights of action for constitutional violations of minority race voting rights. Specifically, this remedy is designed to provide a means for bringing states and local governments into compliance with constitutional guarantees of equal voting rights for racial minorities without the necessity to prove an intentional violation of those rights.<sup>16</sup>

*Fifth.* In enacting amended Section 2, Congress made a deliberate political judgment that the time had come to apply

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the stringent intent-plus-effects test of *Bolden* and to eradicate existing or new mechanisms that perpetuate the effects of past discrimination. See S. Rep. 97-417, *supra* note 10, at 40; H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981) (hereinafter H.R. Rep. No. 97-227).

We accept—and it is not challenged in this action by the state defendants—that Congress intended the amendment to apply to litigation pending upon its effective date. See *Major v. Treen*, *supra*, slip op. at 40-41 n.20.

<sup>15</sup> Both the Senate and House Committee Reports express an intention that amended Section 2 be regarded as remedial rather than merely redefinitional of existing constitutional voting rights. See S. Rep. No. 97-417, *supra* note 10, at 39-43; H.R. Rep. No. 97-227, *supra* note 14, at 31.

<sup>16</sup> Congressional proponents of amended Section 2 were at pains in debate and committee reports to disclaim any intention or power by Congress to overrule the Supreme Court's constitutional interpretation in *Bolden* only that the relevant constitutional provisions prohibited intentional racial vote dilution, and to assert instead a power comparable to that exercised in the enactment of Section 5 of the Voting Rights Act to provide a judicial remedy for enforcement of the state's affirmative obligations to come into compliance. See, e.g., S. Rep. 97-417, *supra* note 10, at 41 ("Congress cannot alter the judicial interpretations in *Bolden* . . . [T]he proposal is a proper statutory exercise of Congress' enforcement power. . . .").

No challenge is made in this action to the constitutionality of Section 2 as a valid exercise of Congress's enforcement powers under the fourteenth (and possibly fifteenth) amendment, and we assume constitutionality on that basis. See *Major v. Treen*, *supra*, slip op. 44-61 (upholding constitutionality against direct attack).

the statute's remedial measures to *present conditions* of racial vote dilution that might be established in particular litigation; that national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes, or by voluntary action of state and local governments, or by judicial remedies limited to proof of intentional racial discrimination. See, e.g., S. Rep. 97-417, *supra* note 10, at 193 (additional view of Senator Dole) (asserting purpose to eradicate "racial discrimination which . . . still exists in the American electoral process").

In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority;<sup>17</sup> the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior;<sup>18</sup> the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building;<sup>19</sup> and the

<sup>17</sup> See *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 542-46 (Feb. 1, 1982) (hereafter *Senate Hearings*) (prepared statement of Professor McManus, pointing to disagreements within black community leadership over relative virtues of local districting plans).

<sup>18</sup> See *Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess., *Voting Rights Act*, Report on S. 1992, at 42-43 (Comm. Print 1982) (hereafter *Subcommittee Report*), reprinted in S. Rep. No. 97-417, *supra* note 10, 107, 149 (asserting "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials"); *Subcommittee Report*, *supra*, at 45, reprinted in S. Rep. No. 97-417, *supra* note 10, at 150 (asserting that amended Section 2 would aggravate segregated housing patterns by encouraging blacks to remain in safe black legislative districts).

<sup>19</sup> See *Subcommittee Report*, *supra* note 18, at 43-44, reprinted in S. Rep. No. 97-417, *supra* note 10, at 149-50.

fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.<sup>20</sup>

For courts applying Section 2, the significance of Congress's general rejection or assumption of these risks as a matter of political judgment is that they are not among the circumstances to be considered in determining whether a challenged electoral mechanism presently "results" in racial vote dilution, either as a new or perpetuated condition. If it does, the remedy follows, all risks to these values having been assessed and accepted by Congress. It is therefore irrelevant for courts applying amended Section 2 to speculate or to attempt to make findings as to whether a presently existing condition of racial vote dilution is likely in due course to be removed by normal political processes, or by affirmative acts of the affected government, or that some elements of the racial minority prefer to rely upon those processes rather than having the judicial remedy invoked.

### III

#### Findings of Fact

##### A.

#### The Challenged Districts

The redistricting plans for the North Carolina Senate and House of Representatives enacted by the General Assembly of North Carolina in April of 1982 included six multi-member districts and one single-member district that are the subjects of the racial vote dilution challenge in this action.

<sup>20</sup> See *Senate Hearings*, *supra*, note 17, at 1351-54 (Feb. 12, 1982) (prepared statement of Professor Blumstein); *id.* at 509-10 (Jan. 28, 1982) (prepared statement of Professor Erler), reprinted in S. Rep. No. 97-417, *supra* note 10, at 147; *id.* at 231 (Jan. 27, 1982) (testimony of Professor Berns), reprinted in S. Rep. No. 97-417, *supra* note 10, at 147.

The multi-member districts, each of which continued pre-existing districts and apportionments, are as follows, with their compositions, and their apportionments of members and the percentage of their total populations and of their registered voters that are black:

District	% of Population that is Black	% of Registered Voters that is Black (as of 10/4/82)
Senate No. 22 (Mecklenburg and Cabarrus Counties (4 members))	24.3	16.8
House No. 36 (Mecklenburg County) (8 members)	26.5	18.0
House No. 39 (Part of For- syth County) (5 members)	25.1	20.8
House No. 23 (Durham County) (3 members)	36.3	28.6
House No. 21 (Wake County) (6 members)	21.8	15.1
House No. 8 (Wilson, Nash and Edgecombe Counties) (4 members)	39.5	29.5

As these districts are constituted, black citizens make up distinct population and registered-voter minorities in each.

Of these districts, only House District No. 8 is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration. For example, concentrations of black citizens em-



braced within the following single-member districts, as depicted on exhibits before the court, would meet those criteria:

<i>Multi-Member District</i>	<i>Single-Member District: location and racial composition</i>	<i>Exhibit</i>
Senate No. 22 (Mecklenburg/Cabarrus Counties)	Part of Mecklenburg County; 70.0% Black	Pl. Ex. 9
House No. 36 (Mecklenburg County)	(1) Part of Mecklenburg County; 66.1% Black	Pl. Ex. 4
	(2) Part of Mecklenburg County; 71.2% Black	Pl. Ex. 4
House No. 39 (Part of Forsyth County)	Part of Forsyth County; 70.0% Black	Pl. Ex. 5
House No. 23 (Durham County)	Part of Durham County; 70.9% Black	Pl. Ex. 6 substitute
House No. 21 (Wake County)	Part of Wake County; 67.0% Black	Pl. Ex. 7
House No. 8 (Wilson, Edgecombe, Nash Counties)	Parts of Wilson, Edgecombe and Nash Counties; 62.7% Black	Pl. Ex. 8

The single-member district is Senate District No. 2 in the rural northeastern section of the state. It was formed by extensive realignment of existing districts to encompass an area which formerly supplied components of two multi-member Senate districts (No. 1 of 2 members; No. 6 of 2 members). It consists of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax and Edgecombe Counties. Black citizens made up 55.1% of the total population of the district, and 46.2% of the population that is registered to vote. This does not constitute them an effective voting majority in this district.<sup>21</sup>

<sup>21</sup> We need not attempt at this point to define the exact population level at which blacks would constitute an effective (non-diluted) voting majority, either generally or in this area. Defendant's expert witness testified that a general "rule of thumb" for insuring an effective voting majority is 65%. This  
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This district is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of creation of this single-member district, there was a concentration of black citizens within the boundaries of this district and those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district, which single-member district would satisfy all constitutional requirements of population and geographical configuration. For example, a concentration of black voters embraced within a district depicted on Plaintiff's Exhibit 10(a) could minimally meet these criteria, though a still larger concentration might prove necessary to make the majority a truly effective one, depending upon experience in the new district alignments. In such a district, black citizens would constitute 60.7% of the total population and 51.02% of the registered voters (as contrasted with percentages of 55.1% and 46.2%, respectively, in challenged Senate District 2).

## B

### Circumstances Relevant To The Claim Of Racial Vote Dilution: The "Zimmer Factors"

At the time the challenged districting plan was enacted in 1982, the following circumstances affected the plan's effect

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is the percentage used as a "benchmark" by the Justice Department in administering § 5. Plaintiffs' expert witness opined that a 60% population majority in the area of this district could only be considered a "competitive" one rather than a "safe" one.

On the uncontradicted evidence adduced we find—and need only find for present purposes—that the extant 55.1% black population majority does not constitute an effective voting majority, i.e., does not establish *per se* the absence of racial vote dilution, in this district. See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150 (5th Cir. 1977) ("Where . . . cohesive black voting strength is fragmented among districts, . . . the presence of districts with bare population majorities not only does not necessarily preclude dilution but . . . may actually enhance the possibility of continued minority political impotence.").



upon the voting strength of black voters of the state (the plaintiff class), and particularly those in the areas of the challenged districts.

#### **A History Of Official Discrimination Against Black Citizens In Voting Matters**

Following the emancipation of blacks from slavery and the period of post-war Reconstruction, the State of North Carolina had officially and effectively discriminated against black citizens in matters touching their exercise of the voting franchise for a period of around seventy years, roughly two generations, from ca. 1900 to ca. 1970. The history of black citizens' attempts since the Reconstruction era to participate effectively in the political process and the white majority's resistance to those efforts is a bitter one, fraught with racial animosities that linger in diminished but still evident form to the present and that remain centered upon the voting strength of black citizens as an identified group.

From 1868 to 1875, black citizens, newly emancipated and given the legal right to vote, effectively exercised the franchise, in coalition with white Republicans, to control the state legislature. In 1875, the Democratic Party, overwhelmingly white in composition, regained control of state government and began deliberate efforts to reduce participation by black citizens in the political processes. These efforts were not immediately and wholly successful and black male citizens continued to vote and to hold elective office for the remainder of the nineteenth century.

This continued participation by black males in the political process was furthered by Fusionists' (Populist and Republican coalition) assumption of control of the state legislature in 1894. For a brief season, this resulted in legislation favorable to black citizens' political participation as well as their economic advancement.

The Fusionists' legislative program favorable to blacks impelled the white-dominated Democratic Party to undertake an

overt white supremacy political campaign to destroy the Fusionist coalition by arousing white fears of Negro rule. This campaign, characterized by blatant racist appeals by pamphlet and cartoon, aided by acts of outright intimidation, succeeded in restoring the Democratic Party to control of the legislature in 1898. The 1898 legislature then adopted constitutional amendments specifically designed to disenfranchise black voters by imposing a poll tax and a literacy test for voting with a grandfather clause for the literacy test whose effect was to limit the disenfranchising effect to blacks. The amendments were adopted by the voters of the state, following a comparable white supremacy campaign, in 1900. The 1900 official literacy test continued to be freely applied for 60 years in a variety of forms that effectively disenfranchised most blacks. In 1961, the North Carolina Supreme Court declared unconstitutional the practice of requiring a registrant to write the North Carolina Constitution from dictation, but upheld the practice of requiring a registrant "of uncertain ability" to read and copy in writing the state Constitution. *Bazemore v. Bertie County Board of Elections*, 254 N.C. 398 (1961). At least until around 1970, the practice of requiring black citizens to read and write the Constitution in order to vote was continued in some areas of the state. Not until around 1970 did the State Board of Elections officially direct cessation of the administration of any form of literacy test.

Other official voting mechanisms designed to minimize or cancel the potential voting strength of black citizens were also employed by the state during this period. In 1955, an anti-single shot voting law applicable to specified municipalities and counties was enacted. It was enforced, with the intended effect of fragmenting a black minority's total vote between two or more candidates in a multi-seat election and preventing its concentration on one candidate, until declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). In 1967, a numbered-seat plan for election in multi-member legislative districts was enacted. Its effect was, as intended, to prevent single-shot voting in multi-member legislative dis-

tricts. It was applied until declared unconstitutional in the *Dunston* case, *supra*, in 1972.

In direct consequence of the poll tax and the literacy test, black citizens in much larger percentages of their total numbers than the comparable percentages of white citizens were either directly denied registration or chilled from making the attempt from the time of imposition of these devices until their removal. After their removal as direct barriers to registration, their chilling effect on two or more generations of black citizens has persisted to the present as at least one cause of continued relatively depressed levels of black voter registration. Between 1930 and 1948 the percentage of black citizens who successfully sought to register under the poll tax and literacy tests increased from zero to 15%. During this eighteen-year period that only ended after World War II, no black was elected to public office in the state. In 1960, twelve years later, after the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), only 39.1% of the black voting age population was registered to vote, compared to 92.1% of age-qualified whites. By 1971, following the civil rights movement, 44.4% of age-qualified blacks were registered compared to 60.6% of whites. This general range of statewide disparity continued into 1980, when 51.3% of age-qualified blacks and 70.1% of whites were registered, and into 1982 when 52.7% of age-qualified blacks and 66.7% of whites were registered.<sup>22</sup>

<sup>22</sup> The recent history of white and black voter registration statewide and in the areas of the challenged districts is shown on the following chart.

	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Whole State	61.7	43.7	70.1	51.3	66.7	52.7
Mecklenburg	71.3	40.8	73.8	48.4	73.0	50.8
Forsyth	65.8	58.7	76.3	67.7	69.4	64.1
Durham	63.0	39.4	70.7	45.8	66.0	52.9
Wake	61.2	37.5	76.0	48.9	72.2	49.7
Wilson	60.9	36.3	66.9	40.9	64.2	48.0

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Under the present Governor's administration an intelligent and determined effort is being made by the State Board of Elections to increase the percentages of both white and black voter registrations, with special emphasis being placed upon increasing the levels of registration in groups, including blacks, in which those levels have traditionally been depressed relative to the total voting age population. This good faith effort by the currently responsible state agency, directly reversing official state policies which persisted for more than seventy years into this century, is demonstrably now producing some of its intended results. If continued on a sustained basis over a sufficient period, the effort might succeed in removing the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens. But at the present time the gap has not been closed, and there is of course no guarantee that the effort will be continued past the end of the present state administration.

The present condition - which we assess - is that, on a statewide basis, black voter registration remains depressed relative to that of the white majority, in part at least because of the long period of official state denial and chilling of black

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	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Edgecombe	63.8	37.9	68.2	50.4	62.7	53.1
Nash	61.2	39.0	72.0	41.2	64.2	43.0
Bertie	75.6	46.0	77.0	54.1	74.6	60.0
Chowan	71.3	44.3	77.4	53.9	74.1	54.0
Gates	80.9	73.5	83.9	77.8	83.6	82.3
Halifax	66.8	40.9	72.0	50.4	67.3	55.3
Hertford	75.6	56.6	81.8	62.5	68.7	58.3
Martin	69.3	49.7	76.9	55.3	71.2	53.3
Northampton	72.4	58.8	77.0	63.9	82.1	73.9
Washington	74.3	62.8	82.2	68.0	75.6	67.4



citizens' registration efforts. This statewide depression of black voter registration levels is generally replicated in the areas of the challenged districts, and in each is traceable in part at least to the historical statewide pattern of official discrimination here found to have existed.

#### Effects Of Racial Discrimination In Facilities, Education, Employment, Housing And Health

In consequence of a long history, only recently alleviated to some degree, of racial discrimination in public and private facility uses, education, employment, housing and health care, black registered voters of the state remain hindered, relative to the white majority, in their ability to participate effectively in the political process.

At the start of this century, *de jure* segregation of the races in practically all areas of their common life existed in North Carolina. This condition continued essentially unbroken for another sixty-odd years, through both World Wars and the Korean conflict, and through the 1950's. During this period, in addition to prohibiting inter-racial marriages, state statutes provided for segregation of the races in fraternal orders and societies; the seating and waiting rooms of railroads and other common carriers; cemeteries; prisons, jails and juvenile detention centers; institutions for the blind, deaf and mentally ill; public and some private toilets; schools and school districts; orphanages; colleges; and library reading rooms. With the exception of those laws relating to schools and colleges, most of these statutes were not repealed until after passage of the federal Civil Rights Act of 1964, some as late as 1973.

Public schools in North Carolina were officially segregated by race until 1954 when *Brown v. Board of Education* was decided. During the long period of *de jure* segregation, the black schools were consistently less well funded and were qualitatively inferior. Following the *Brown* decision, the public schools remained substantially segregated for yet another fifteen years on a *de facto* basis, in part at least because of various practical impediments erected by the state to judicial

enforcement of the constitutional right to desegregated public education recognized in *Brown*. As late as 1960, only 226 black students throughout the entire state attended formerly all-white public schools. Until the end of the 1960's, practically all the state's public schools remained almost all white or almost all black. Substantial desegregation of the public schools only began to take place around a decade ago, following the Supreme Court's decision in *Swann v. Mecklenburg County Board of Education*, 402 U.S. 1 (1971). In the interval since, "white-flight" patterns in some areas of the state have prevented or reversed developing patterns or desegregation of the schools. In consequence, substantial pockets of *de facto* segregation of the races in public school education have re-arisen or have continued to exist to this time though without the great disparities in public funding and other support that characterized *de jure* segregation of the schools.

Because significant desegregation of the public schools only commenced in the early 1970's, most of the black citizens of the state who were educated in this state and who are over 30 years of age attended qualitatively inferior racially segregated public schools for all or most of their primary and secondary education. The first group of black citizens who have attended integrated public schools throughout their educational careers are just now reaching voting age. In at least partial consequence of this segregated pattern of public education and the general inferiority of *de jure* segregated black schools, black citizens of the state who are over 25 year of age are substantially more likely than whites to have completed less than 8 years of education (34.6% of blacks; 22.0% of whites), and are substantially less likely than whites to have had any schooling beyond high school (17.3% of blacks; 29.3% of whites).

Residential housing patterns in North Carolina, as generally in states with histories of *de jure* segregation, have traditionally been separated along racial lines. That pattern persists today in North Carolina generally and in the areas covered by the challenged districts specifically; in the latter, virtually all residential neighborhoods are racially identifiable. Statewide,



black households are twice as likely as white households to be renting rather than purchasing their residences and are substantially more likely to be living in overcrowded housing, substandard housing, or housing with inadequate plumbing.

Black citizens of North Carolina have historically suffered disadvantage relative to white citizens in public and private employment. Though federal employment discrimination laws have, since 1964, led to improvement, the effects of past discrimination against blacks in employment continue at present to contribute to their relative disadvantage. On a statewide basis, generally replicated in the challenged districts in this action, Blacks generally hold lower paying jobs than do whites, and consistently suffer higher incidences of unemployment. In public employment by the state, for example, a higher percentage of black employees than of whites is employed at every salary level below \$12,000 per year and a higher percentage of white employees than black is employed at every level above \$12,000.

At least partially because of this continued disparity in employment opportunities, black citizens are three times as likely as whites to have incomes below the poverty level (30% to 10%); the mean income of black citizens is 64.9% that of white citizens; white families are more than twice as likely as black families to have incomes over \$20,000; and 25.1% of all black families, compared to 7.3% of white families, have no private vehicle available for transportation.

In matters of general health, black citizens of North Carolina are, on available primary indicators, as a group less physically healthy than are white citizens as a group. On a statewide basis, the infant mortality rate (the standard health measure used by sociologists) is approximately twice as high for non-whites (predominately blacks) as for whites. This statewide figure is generally replicated in Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe and Nash Counties (all included within the challenged multi-member districts). Again, on a statewide basis, the death rate is higher for black

citizens than for white, and the life-expectancy of black citizens is shorter than is that of whites.

On all the socio-economic factors treated in the above findings, the status of black citizens as a group is lower than is that of white citizens as a group. This is true statewide, and it is true with respect to every county in each of the districts under challenge in this action. This lower socioeconomic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests.<sup>23</sup>

#### **Other Voting Procedures That Lessen The Opportunity Of Black Voters To Elect Candidates Of Their Choice**

In addition to the numbered seat requirement and the anti-single shot provisions of state law that were declared unconstitutional in 1972, *see supra* p. 28, North Carolina has, since 1915, had a majority vote requirement which applies to all primary elections, but not to general elections. N.C.G.S. § 163-111.<sup>24</sup>

The general effect of a majority vote requirement is to make it less likely that the candidates of any identifiable voting

<sup>23</sup> Section 2 claimants are not required to demonstrate by direct evidence a causal nexus between their relatively depressed socio-economic status and a lessening of their opportunity to participate effectively in the political process. *See* S. Rep. No. 97-417, *supra* note 10, at 29 n.114. Under incorporated *White v. Regester* jurisprudence, "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977). Independently of any such general presumption incorporated in amended Section 2, we would readily draw the inference from the evidence in this case.

<sup>24</sup> There is no suggestion that when originally enacted in 1915, its purpose was racially discriminatory. That point is irrelevant in assessing its present effect, as a continued mechanism, in the totality of circumstances bearing upon plaintiffs' dilution claim. *See* Part II, *supra*.

minority will finally win elections, given the necessity that they achieve a majority of votes, if not in a first election, then (if called for) in a run-off election. This generally adverse effect on any cohesive voting minority is, of course, enhanced for racial minority groups if, as we find to be the fact in this case, *see infra* pp. 48-58, racial polarization in voting patterns also exists.

While no black candidate for election to the North Carolina General Assembly—either in the challenged districts or elsewhere—has so far lost (or failed to win) an election solely because of the majority vote requirement, the requirement nevertheless exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts to elect candidates of their choice.

The North Carolina majority vote requirement manifestly operates with the general effect noted upon *all* candidates in primary elections. Since 1950, eighteen candidates for the General Assembly who led first primaries with less than a majority of votes have lost run-off elections, as have twelve candidates for other statewide offices, including a black candidate for Lt. Governor and a black candidate for Congress. The requirement therefore necessarily operates as a general, ongoing impediment to any cohesive voting minority's opportunity to elect candidates of its choice in any contested primary, and particularly to any racial minority in a racially-polarized vote setting.<sup>25</sup>

North Carolina does not have a subdistrict residency requirement for members of the Senate and House elected from multi-member districts, a requirement which could to some degree off-set the disadvantage of any voting minority in multi-member districts.<sup>26</sup>

<sup>25</sup> See *White v. Regester*, 412 U.S. 775, 766 (1973).

<sup>26</sup> See *id.* at 766 n.10.

### Use Of Racial Appeals In Political Campaigns

From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns. The appeals have been overt and blatant at some times, more subtle and furtive at others. They have tended to be most overt and blatant in those periods when blacks were openly asserting political and civil rights—during the Reconstruction-Fusion era and during the era of the major civil rights movement in the 1950's and 1960's. During the period from ca. 1900 to ca. 1948 when black citizens of the state were generally quiescent under *de jure* segregation, and when there were few black voters and no black elected officials, racial appeals in political campaigning were simply not relevant and accordingly were not used. With the early stirrings of what became the civil rights movement following World War II, overt racial appeals reappeared in the campaign of some North Carolina candidates. Though by and large less gross and virulent than were those of the outright white supremacy campaigns of 50 years earlier, these renewed racial appeals picked up on the same obvious themes of that earlier time: black domination or influence over "moderate" or "liberal" white candidates and the threat of "negro rule" or "black power" by blacks "bloc voting" for black candidates or black-"dominated" candidates. In recent years, as the civil rights movement, culminating in the Civil Rights Act of 1964, completed the eradication of *de jure* segregation, and as overt expressions of racist attitudes became less socially acceptable, these appeals have become more subtle in form and furtive in their dissemination, but they persist to this time.

The record in this case is replete with specific examples of this general pattern of racial appeals in political campaigns. In addition to the crude cartoons and pamphlets of the outright white supremacy campaigning of the 1890's which featured white political opponents in the company of black political leaders, later examples include various campaign materials,



unmistakably appealing to the same racial fears and prejudices, that were disseminated during some of the most hotly contested statewide campaigns of the state's recent history: the 1950 campaign for the United States Senate; the 1954 campaign for the United States Senate; the 1960 campaign for Governor; the 1968 campaign for Governor; the 1968 Presidential campaign in North Carolina; the 1972 campaign for the United States Senate; and most recently, in the imminent 1984 campaign for the United States Senate.

Numerous other examples of assertedly more subtle forms of "telegraphed" racial appeals in a great number of local and statewide elections, abound in the record. Laying aside the more attenuated forms of arguably racial allusions in some of these, we find that racial appeals in North Carolina political campaigns have for the past thirty years been widespread and persistent.

The contents of these materials reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices on the part of white citizens in regard to black citizens and to black citizens' participation in the political processes of the state. The continued dissemination of these materials throughout this period and down to the present time evidences an informed perception by the persons who have disseminated them that they have had their intended effect to a degree warranting their continued use.

On this basis, we find that the historic use of racial appeals in political campaigns in North Carolina persists to the present time and that its effect is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

#### **The Extent Of Election Of Black Citizens To Public Office**

*Statewide history.* It appears that, with one exception, no black citizen was elected during this century to public office in North Carolina until after World War II. In 1948 and during

the early 1950's a few black citizens were elected to various city councils. Twenty years later, in 1970, there were in the state 62 black elected officials. In 1969 a black citizen was elected to the State House of Representatives for the first time since Reconstruction; in 1975 two blacks were elected, for the first time, to the Senate. From 1970 to 1975 the number of black elected officials increased from 62 to over 200 statewide; in 1982, that number had increased to 255.

At present the number of elected black officials remains quite low in relation to total black population, which is 22.4% of the state total. Black citizens hold 9% of the city council seats (in cities of over 500 population); 7.3% of county commission seats; 4% of sheriff's offices; and 1% of the offices of Clerk of Superior Court. There are 19 black mayors, 13 of whom are in majority black municipalities. Of the black city council members, approximately 40% are from majority black municipalities or election districts. Three black judges have been elected in statewide elections to seats to which they had been appointed by the Governor. Other than these judges, no black has yet been elected during this century to any statewide office or to the Congress of the United States as a representative of this state.

Between 1971 and 1982 there have been, at any given time, between two and four black members of the North Carolina House of Representatives out of a total of 120—between 1.6% and 3.3%. From 1975 to 1983 there have been, at any given time, either one or two black members of the State Senate out of a total of 50—between 2% and 4%. Most recently, in 1982, after this action was filed, 11 black citizens were elected to the State House of Representatives. Six of those 11 were elected from multi-member districts in which blacks constituted a voting minority (including 5 of those challenged); 5 were elected from newly created majority black districts.

Historically, in those multi-member districts where some blacks have succeeded in being elected, overall black candidacies have been significantly less successful than white candida-



cies have been significantly less successful than white candidates. Black candidates who, between 1970 and 1982, won in Democratic primaries in the six multi-member districts under challenge here were three times as likely to lose in the general election as were their white Democratic counterparts, a fact of statistical significance in assessing the continued effect of race in those elections.

#### **In The Challenged Multi-Member Districts**

##### **House District 36 (Mecklenburg County); Senate District 22 (Mecklenburg/Cabarrus Counties).**

In this century one black citizen has been elected to the State House of Representatives and one black citizen has been elected to the Senate from Mecklenburg County. The House member was elected as one of an eight-member delegation in 1982, after this lawsuit was commenced. Seven other black citizens had previously run unsuccessfully for a House seat. The Senate member served as one of a 4-member delegation from Mecklenburg and Cabarrus Counties from 1975 to 1980. Since then two black citizens have run successfully and no black now serves on the Senate delegation.

Since World War II, blacks, who now constitute 31% of the city's population, have been elected to the City Council of Charlotte, but never in numbers remotely proportional to their percentage of the city's population. During the period 1945 to 1975, when the council was elected all at-large, blacks constituted 5.4% of its membership. From 1977-1981, when the council was elected partially at-large and partially by districts, blacks won 28.6% of the district seats compared with 16.7% of the at-large seats, though more ran for the latter than the former.

One black citizen has been elected (three times) and defeated one time for membership on the five-member County Board of Commissioners, and presently serves. Two black citizens have been elected and now serve on the nine-member County Board of Education.

Following trial of this action, a black citizen was elected mayor of the City of Charlotte, running as a Democrat against a white Republican. The successful black candidate, a widely-respected architect, received approximately 38% of the white vote.

##### **House District No. 29 (part of Forsyth County).**

Before 1974 Black citizens had been elected to the City Council of Winston-Salem, but to no other public office. In 1974 and again in 1976 a black citizen was elected to the House of Representatives as one of a five-member delegation. In 1978 and 1980 other black citizens ran unsuccessfully for the House. In 1982, after this litigation was commenced, two black citizens were elected to the House.

No black citizen has been elected to the Senate from Forsyth County.

Since 1974, a black citizen has been elected, twice failed to be reelected, then succeeded in being reelected to one of eight seats on the otherwise all-white Board of Education; and another has been elected, failed to be reelected, then succeeded in being reelected to one of five seats on the otherwise all-white Board of County Commissioners.

##### **House District No. 23 (Durham County).**

Since 1973 a black citizen has been elected each two-year term to the State House. No black citizen has been elected to the Senate. Since 1969, blacks have been elected to the Board of County Commissioners, and three of twelve Durham City Council members are blacks elected in at-large elections. The City of Durham is 47% black in population.

##### **House District No. 21 (Wake County).**

A black citizen has been twice elected to the State House five-member delegation from this district and is presently serving. Another black citizen was elected for two terms to the State Senate, serving from 1975 to 1978.

A black citizen has been twice elected Sheriff of Wake County and is presently in that office. Another black citizen, who lives in an affluent white neighborhood, has served since 1972 as the only black on the seven-member County Board of Commissioners. Another black citizen, elected from a majority black district, serves as the only black on the nine-member County School Board. Another black citizen served one term as mayor of the City of Raleigh from 1973 to 1975, and still another serves on the Raleigh City Council.

**House District No. 8 (Edgecombe, Nash, Wilson Counties).**

There has never been a black member of the State House or Senate from the area covered by this district. There had never been a black member of the Board of County Commissioners of any of the three counties until 1982 when two blacks were elected to the five-member Board in Edgecombe County, in which blacks constitute 43% of the registered voters. In Wilson County, where the black population is 36.5% of the total, one of nine members of the County Board of Education is black. In the City of Wilson, which is over 40% black in population, one of six city councilmen is black.

**Senate District No. 2 ( Northampton, Hertford, Gates, Bertie, Chowan, and parts of Washington, Martin, Halifax and Edgecombe Counties).**

No black person has ever been elected to the State Senate from any of the area covered by the district. In the last four years, black candidates have won three elections for the State House from areas within the borders of this district, one in 1980 in a majority-white multi-member district, two in 1982 in different majority-black districts. In Gates County, where 49% of the registered voters are black, a black citizen has been elected and presently serves as Clerk of Court. In Halifax County, black citizens have run successfully for the Board of County Commissioners and for the City Council of Roanoke Rapids.

Looking only to these basic historical facts respecting black citizens' election to public office, we draw the following inferences. Thirty-five years after the first successful candidacies for public office by black citizens in this century, it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina. The chances of a black candidate's being elected are better where the candidacy is in a majority-black constituency, where the candidacy is in a single-member rather than a multi-member or at-large district, where it is for local rather than statewide office, and where the black candidate is a member of the political party currently in the ascendancy with voters. Relative to white candidates running for the same office at whatever level, black candidates remain at a disadvantage in terms of relative probability of success. The overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population. There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.<sup>27</sup> In any event, the success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even

<sup>27</sup> Both parties offered evidence—anecdotal, informed "lay opinion," and documentary—to establish on the one hand that recent black successes indicated an established breakthrough from any preexisting racial vote dilution and on the other, that those successes are too "haphazard" and aberrational in terms of specific candidacies, issues, and political trends and, in any event, still too minimal in numbers, to support any such ultimate inference. Heavily emphasized with respect to successful black candidacies in 1982 was the fact that in some elections the pendency of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting, and that this cannot be expected to recur. Our finding, as stated in text, reflects our weighing of these conflicting inferences.



arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

### Racial Polarization in Voting

Statistical evidence presented by duly qualified expert witnesses for plaintiffs, supplemented to some degree by direct testimony of lay witnesses, establishes, and we find, that within all the challenged districts racially polarized voting exists in a persistent and severe degree.

### Multi-Member Districts

To analyze the existence and extent of any racially polarized voting in the challenged multi-member districts, Dr. Bernard Grofman, a duly qualified expert witness for plaintiffs, had collected and studied data from 53 sets of recent election returns involving black candidacies in all of the challenged multi-member districts.<sup>28</sup> Based upon two complementary methods of analysis of the collected data,<sup>29</sup> Grofman gave as his opinion, and we find, that in each of the elections analyzed racial polarization did exist and that the degree revealed in every

<sup>28</sup> Included were all the elections for the General Assembly in which there were black candidates in Mecklenburg, Durham, and Forsyth County; elections for the State House of Representatives in Wilson, Edgecombe, and Nash Counties; and elections for the State Senate in Cabarrus County for the election years 1978, 1980, and 1982; county-wide local elections in each of Wilson, Edgecombe and Nash Counties in which there were black candidates. The 53 elections included both primary and general elections and represented a total of 32 different election contests.

<sup>29</sup> The two methods employed, both standard in the literature for the analysis of racially polarized voting, were an "extreme case" analysis and an "ecological regression" analysis. The extreme case analysis focuses on voting in racially segregated precincts; the regression analysis uses both racially segregated and racially mixed precincts and provides any corrective method to reflect the fact that voters in the two types may behave differently. In Dr.

(footnote continued on next page)

election analyzed was statistically significant, in the sense that the probability of its occurring by chance was less than one in 100,000;<sup>30</sup> and that in all but two of the elections the degree revealed was so marked as to be substantively significant, in the sense that the results of the individual election would have

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Grofman's analysis the results under both methods conformed closely in most cases. The purpose of both methods is simply to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates.

Defendants' duly qualified expert witness, Dr. Thomas Hofeller, had studied Dr. Grofman's data and the mathematics of his analysis of that data, and heard his live testimony. Aside from two mathematical or typographical errors, Dr. Hofeller did not question the accuracy of the data, its adequacy as a reliable sample for the purpose used, nor that the methods of analysis used were standard in the literature. He questioned the reliability of an extreme case analysis standing alone, but, as indicated, Dr. Grofman's did not stand alone. Dr. Hofeller also questioned Dr. Grofman's failure to make an exact count of voter turn-out by race rather than using estimated figures. The literature makes no such demand of precision in obtaining this figure, and Dr. Grofman's method of estimating is accepted. Dr. Hofeller made no specific suggestion of error in the figures used.

We have accepted the accuracy and reliability of the data collected and the methods of analysis used by Dr. Grofman for the purposes offered. The general reliability of Dr. Grofman's analysis was further confirmed by the testimony of Dr. Theodore Arrington, a duly qualified expert witness for the Pugh intervenor-plaintiffs, see note 4, *supra*. Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization in the narrower area of his study.

<sup>30</sup> These conclusions were reached by determining the correlation between the voters of one race and the number of voters who voted for a candidate of specified race. In experience, correlations above an absolute value of .5 are relatively rare and correlations above .9 extremely rare. All correlations found by Dr. Grofman in the elections studied had absolute values between .7 and .98, with most above .9. This reflected statistical significance at the .00001 level - probability of chance as explanation for the coincidence of voter's and candidate's race less than one in 100,000. Cf. *Major v. Treen*, *supra*, slip op. 30-32 n.17 (comparable analysis of racial vote polarization by correlation coefficients).



been different depending upon whether it had been held among only the white voters or only the black voters in the election.<sup>21</sup>

Additional facts revealed by this data support the ultimate finding that severe (substantively significant) racial polarization existed in the multi-member district elections considered as a whole.<sup>22</sup> In none of the elections, primary or general, did a black candidate receive a majority of white votes cast. On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested. Republican voters were more disposed to vote for

<sup>21</sup> The two exceptions involved 1982 State House elections in Durham and Wake Counties, respectively, in which black candidates were elected to seats in majority white multi-member districts. Both were incumbents, and in Durham County there were only two white candidates in the race for three seats so that the black candidate had to win. Though each black candidate won, neither received a majority of the white vote cast. These two exceptions did not alter Dr. Grofman's conclusion that, in his terms, racial polarization in the elections analyzed as a whole was substantially significant. Nor do they alter our finding to the same effect.

<sup>22</sup> Defendants' expert witness questioned the accuracy of any opinion as to the "substantive" significance of statistically significant racial polarization in voting that did not factor in all of the circumstances that might influence particular votes in a particular election. This flies in the face of the general use, in litigation and in the general social science literature, of correlation analysis as the standard method for determining whether vote dilution in the legal (substantive) sense exists, a use conceded by defendant's expert.

white Democrats than to vote for black Democrats. The racial polarization revealed, of course, runs both ways, but it was much more disadvantageous to black voters than to white. Aside from the basic population and registered voter majority advantages had by white voters in any racially polarized setting, fewer white voters voted for black candidates than did black voters for white candidates. In these elections, a significant segment of the white voters would not vote for any black candidate, but few black voters would not vote for any white candidate. One revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates.

The racial polarization revealed in the multi-member elections considered as a whole exists in each of the challenged districts considered separately, as indicated by the following specific findings related to elections within each district.

**House District No. 36 And Senate District No. 22  
(Mecklenburg And Cabarrus Counties).**

In elections in House District No. 36 (Mecklenburg County) between 1980 and 1982, the following percentages of black and white voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

In elections in Senate District No. 22 (Mecklenburg and Cabarrus Counties) between 1978 and 1982, the following per-

centages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

The fact that candidate Berry received votes from one half of the white voters in the primary does not alter the conclusion that there is substantial racially polarized voting in Mecklenburg County in primaries. There were only seven white candidates for eight positions in the primary and one black candidate had to be elected. Berry, the incumbent chairman of the Board of Education, ranked first among black voters but seventh among whites.

The only other black candidate who approached receiving as many as half of the white votes was Fred Alexander, running in the 1978 Senate primary as an incumbent. Alexander ranked last among white voters in the primary and would have been defeated if the election had been held only among the white voters.

Approximately 50% of the white voters voted for neither Berry nor Alexander in the general election.

#### House District No. 39 (Forsyth County).

In House and Senate elections in Forsyth County from 1978-1982 the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 House -				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 House -				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate -				
Small	12	61	n/a	n/a
1982 House -				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

As revealed by this data, no black candidate, whether successful or not, has received more than 40% of the white votes cast in a primary, and no black candidate has received more than 46% of the white votes cast in a general election during the last four elections.

Though black candidates Kennedy and Hauser won the House election in 1982, this does not alter the conclusion that substantial racial polarization of voting continued through that election. White voters ranked Kennedy and Hauser seventh and eighth, respectively, out of eight candidates in the general election. In contrast black voters ranked them first and second respectively.

#### House District No. 23 (Durham County).

In House and Senate Elections from 1978 through 1982, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 Senate -				
Barns (Repub.)	n/a	n/a	17	5
1978 House -				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
<i>1980 House -</i>				
Spaulding	n/a	n/a	49	90
<i>1982 House -</i>				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

Black candidate Spaulding ran uncontested in the general election in 1978 and in the primary and general election in 1980. In the 1982 election there was no Republican opposition and the general election was, for all practical purposes, unopposed. A majority of white voters failed to vote for the black candidate in the general election in each of these years even when they had no other choice. Furthermore, in the 1982 primary, there were only two white candidates for three seats so that one black necessarily had to win. Even in this situation, 63% of white voters did not vote for the black incumbent, the clear choice of the black voters. At least 37% of white voters voted for no black candidate even when one was certain to be elected.

#### House District No. 21 (Wake County).

In elections for the North Carolina House of Representatives from 1978 through 1982 the following percentages of white and black voters voted for the black candidate indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

The fact that black candidate Blue won election in the last two of these candidacies does not alter the conclusion that substantial racial polarization in voting persists in this district. In Wake County winning the Democratic primary is historically tantamount to election. Nevertheless, in these elections

from 60% to 80% of white voters did not vote for the black candidate in the primary compared to 76% and 80% of black voters who did.

Wake County is overwhelmingly Democratic in registration and normally votes along party lines. Nonetheless, 55% of white voters did not vote for the black Democrat in the general election.

#### House District No. 8 (Wilson, Nash, Edgecombe Counties).

In county-wide or district-wide elections from 1976 through 1982 in House District No. 8 and Wilson, Edgecombe and Nash Counties, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
<i>House District No. 8</i>				
1982 House-Carter	4	66		
<i>Wilson County</i>				
1982 Congress-				
1st Primary-Michaux	6	96		
2nd Primary-Michaux	7	98		
1976 County Commission-				
Jones	32	77		
<i>Edgecombe County</i>				
1982 Congress-				
1st Primary-Michaux	2	84		
2nd Primary-Michaux	3	97		
1982 County Commission-				
Green	0	14		
McClain	0	27		
Thorne	4	75	38	91
Walker	2	82	36	94



	Primary White Black	General White Black
--	------------------------	------------------------

## Nash County

## 1982 Congress-

1st Primary	6	73
-------------	---	----

2nd Primary	6	81
-------------	---	----

## 1982 County Commission-

Sumner	9	82
--------	---	----

With one exception, over this period more than 90% of the white voters have failed to vote for the black candidate in every primary in each of these three counties. The one time, in 1982, that black Democratic candidates have run in a general election, they failed to receive over 60% of the white vote even though Edgecombe County is overwhelmingly (88.5%) Democratic.

This data reveals racial polarization of voting in House District No. 8 so extreme that, all other factors aside, no black has any chance of winning election in the district as it is presently constituted. This conclusion, as expressed in evidence by plaintiffs' expert witness, was not seriously challenged by defendants.

## Single-Member District

## Senate District No. 2.

Essentially unchallenged and unrebutted opinion evidence given by plaintiffs' expert witness, Dr. Grofman, and testimonial evidence of experienced local political observers and black community leaders establishes that severe and persistent racial polarization in voting exists in the area covered by the challenged single-member Senate District No. 2.

Based on these evidentiary findings with respect to racial polarization in voting, we find that in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and that in each district it presently operates to minimize the voting strength of black voters.

Other Factors Bearing Upon The Claim  
Of Racial Vote Dilution

*Increased participation by black citizens in the political process.*

The court finds that in recent years there has been a measurable increase in the ability and willingness of black citizens to participate in the state's political processes and in its government at state and local levels. The present state administration has appointed a significant number of black citizens to judicial and executive positions in state government, and evinces a good faith determination further to open the political processes to black citizens by that means. In some areas of the state, including some of those directly involved in this litigation, there is increased willingness on the part of influential white politicians openly to draw black citizens into political coalitions and openly to support their candidacies. Indeed, among the witnesses for the state were respected and influential political figures who themselves fit that description.

The court has considered what this implies for the plaintiffs' claim of present racial vote dilution—of a present lack of equal opportunity by black citizens relative to white citizens to participate in the political process and to elect candidates of their choice. Our conclusion is that though this wholesome development is undoubtedly underway and will presumably continue, it has not proceeded to the point of overcoming still entrenched racial vote polarization, and indeed has apparently done little to diminish the level of that single most powerful factor in causing racial vote dilution. The participatory level of black citizens is still minimal in relation to the overall black population, and, quite understandably, is largely confined to the relatively few forerunners who have achieved professional status or otherwise emerged from the generally depressed socio-economic status which, as we have found on the record produced in this case, remains the present lot of the great bulk of black citizens.

### Divisions Within The Black Community.

Not all black citizens in North Carolina, notwithstanding that the class technically certified in this action includes all who are registered to vote, share the same views about the present reality of racial vote dilution in the challenged districts (or presumably elsewhere), nor about the appropriate solution to any dilution that may exist.

Several black citizens testified in this action, as witnesses for the state, to this effect, identifying their own views as opposed to those advanced by plaintiffs' witnesses. In terms of their experience, achievement and general credibility as witnesses, the views of these defendant-witnesses were clearly as deserving of acceptance by the court as were those of the black citizens who, in larger numbers, testified as witnesses for the plaintiffs.

Two facts appeared, however, to the court. The first is that the views expressed by defendants' witnesses went almost exclusively to the desirability of the remedy sought by plaintiffs, and not to the present existence of a condition of vote dilution. The other fact is that the defendants' witnesses' views must be accounted, on the record adduced in this case, a distinct minority viewpoint within the plaintiff class as certified. The division between the two elements is essentially one of proper political ends and means to break free of racial vote dilution as a present condition, and not of the present existence of that condition. Only if a dissident element were so large as to draw in question the very existence of an identifiable black community whose "ability to participate" and "freedom to elect candidates of *its* choice" could rationally be assessed, could the existence of a dissident view have relevance to the establishment of a racial vote dilution claim. That clearly is not the circumstance here, on the record made in this action. As earlier indicated, the further political question of the proper means to eradicate such racial vote dilution as might be shown presently to exist has been decided by Congress and does not properly figure in our judicial inquiry. See Part II, *supra*.

### Fairness Of The State Legislative Policy Underlying The Challenged Redistricting

Under amended § 2 it presumably remains relevant to consider whether race-neutral and compelling state policies might justify a redistricting plan that concededly, or at least arguably, "results" *prima facie* in racial vote dilution. The Senate Report, discussing the continued relevance of the "tenuous state policy" inquiry as one of the incorporated *Zimmer* factors that evolved in *White v. Regester* dilution jurisprudence, indicates as much, though "tenuousness" as a gauge of intent is obviously no longer relevant under § 2's "result-only" test.

If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, *supra* note 10, at 29 & n.117. See also *Major v. Treen*, *supra*, slip op. 67-74 (analyzing state redistricting policy in terms of fairness).

The parties in this litigation have addressed the point under the "tenuous state policy" rubric, and we will assume the inquiry's continued relevance under a "results"-only test. On this basis, we are persuaded that no state policy, either as demonstrably employed by the legislature in its deliberations, or as now asserted by the state in litigation, could "negate a showing" here that actual vote dilution results from the challenged district plan.

During the legislative deliberations on the redistricting plan, the legislature was well aware of the possibility that its plan could result under then applicable federal law in impermissible dilution of black citizens' voting strength if concentrations of black voters were intentionally "submerged" in multi-member districts or "fractured" into separate districts. That fact was brought to its attention by special counsel, by black citizens' groups concerned with the problem, and by various



legislators who proposed plans specifically designed to avoid any possibility of impermissibly diluting black citizens' votes in these ways. The specific dilution problems presented by the black voter concentrations in the challenged districts in this litigation were known to and discussed in legislative deliberations.

The basic policy justification advanced by the state in this litigation for the legislature's declination to create single-member districts to avoid submerging concentrations of black voters in the challenged multi-member districts was the maintenance of an historical, functionally sound tradition of using whole counties as the irreversible "building blocks" of legislative districting. Although the state adduced fairly persuasive evidence that the "whole-county" policy was well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications, that all became largely irrelevant as matters developed in this particular legislative redistricting plan. At the time of its final enactment, the state policy—though compelled—was that counties *might* be split. When the Attorney General declined to give preclearance to the state constitutional prohibition of county divisions in redistricting, the state acquiesced and, indeed, divided counties thereafter both in non-covered as well as covered counties in the final redistricting plan. See note 3, *supra*. To the extent the policy thereafter was to split counties only when necessary to meet population deviation requirements or to obtain § 5 preclearance of particular districts—and this is what the record demonstrates—such a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution.

The same findings apply, though with added force, to Senate District No. 2. There, of course, in the final plan counties *were* split; indeed four were split in the face of a proposed plan which would have yielded an effective black-majority single-member district which only involved splitting two counties. Other policy considerations that were plainly shown to have influenced the legislature in its final drawing of Senate District No. 2 lines

were the protection of incumbents and, in the words of one legislator-witness in this action, swallowing the "smallest of three pills" offered by the Justice Department in preclearance negotiations respecting the lowest permissible size of the black population concentration in the district. Obviously, neither of these policies could serve to outweigh a racial dilution result.

The final policy consideration suggested by the state is the avoidance of race-conscious gerrymandering. While there may be some final constitutional constraint here, *cf. Karcher v. Daggett*, \_\_\_ U.S. \_\_\_, \_\_\_, 51 U.S.L.W. 4853, 4860 (U.S. June 22, 1983) (Stevens, J., concurring), we find that it is not approached here by the available means of avoiding submergence or fragmentation of any of the black voter concentrations at issue. The most serious problem is that posed by the configuration of the black voter concentration in House District No. 8, comprised of Wilson, Nash and Edgecombe Counties. The configuration of the single-member district specifically suggested by the plaintiffs as a viable one is obviously not a model of aesthetic tidiness. But given the evidence, not challenged by defendants, that in the present multi-member district the black population, 39.5% of the total, simply cannot hope ever to elect a candidate of its choice, aesthetics, as opposed to compactness and commonality of interests, cannot be accorded primacy. See *Carstens v. Lamm*, *supra*; *Skolnick v. State Electoral Board*, 336 F. Supp. 839, 843 (N.D. Ill. 1971) (three-judge court) (even compactness not a fundamental requirement).

#### Ultimate Findings Of Fact

1. Considered in conjunction with the totality of relevant circumstances found by the court—the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting, substantial to severe racial polarization in voting, the effects of thirty years of persistent racial appeals in political campaigns, a relatively depressed socio-economic status resulting in significant degree from a century of *de jure* and *de facto* segregation, and the

continuing effect of a majority vote requirement—the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Considered in conjunction with the same circumstances, the creation of single-member Senate District No. 2 results in the black registered voters in an area covered by Senate Districts Nos. 2 and 6 having their voting strength diluted by fracturing their concentration into two districts in each of which they are a voting minority and in consequence have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>33</sup>

<sup>33</sup> The state challenges the basic premise of this finding with the familiar argument that the relative merits of legislative division of a minority population that is not large enough to form voting majorities in two single-member districts into an effective voting majority in one single-member district and an ineffective minority in another or, on the other hand, dividing it into two substantially influential minorities in two districts is so problematical that neither the one nor the other division can properly be adjudged "dilutive" by a court. See, e.g., *Seamon v. Upham*, 536 F. Supp. 931, 949 (E.D. Tex.) (three-judge court) *rev'd on other grounds*, 456 U.S. 37 (1982); compare *Jordan v. Winter*, 541 F. Supp. 1135, 1143 (N.D. Miss. 1982) (three-judge court), *vacated and remanded for further consideration in light of amended § 2*, 103 S. Ct. 2077 (1983) (legislative preference unchallengeable) with *Kirksey v. Board of Supervisors*, 554 F.2d at 150 (dilution possible even if one of districts has a bare black population majority). The specific argument here is that any increase in the present minority population of 55.1% in Senate District No. 2 will be at the expense of the present 49.3% black population in Senate District No. 6, the obvious source of District 2 increase.

We are not impressed with the argument. While the dilemma is a real one, we think it is one that Congress has, in effect, committed to the judgment of the black community to whom it has given the private right of action under amended § 2. The right created is, by definition, that of a "class" and the procedural means of vindicating it by a class action has also been provided by

(footnote continued on next page)

## IV

## CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter of the action under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1973c.

2. The court is properly convened as a three-judge court under 28 U.S.C. § 2284(a).

3. The action has been properly certified as a class action on behalf of all black residents of North Carolina who are registered to vote. No challenge is made to the propriety of the class action under any of the criteria of the governing class action rule, Rule 23, Fed. R. Civ. P.

4. Of the challenged districts, only House District No. 8 (Wilson, Edgecombe and Nash) and Senate District No. 2 include counties that are covered under § 4(a) of the Voting

(footnote continued from previous page)

Congress in Fed.R.Civ.P. 23. When, as here, such a class action is brought by a class which includes such a fragmented concentration of black voters, a group judgment about the group's best means of access to the political process must be assumed reflected in the specific claim made by the class. The legitimacy of that group judgment, from the standpoint of members of the class identified, can be put to test by standard procedures: by challenges to the adequacy of representation or the typicality of claims by any members of the identified class who question the wisdom or validity of the class claim under Rule 23(a)(3) & (4), Fed.R.Civ.P., or even by attempted intervention under Rule 24, Fed.R.Civ.P. When, as here, no such challenges are made, a dilution claim made by the class is properly assessed in the terms made, and on the understanding that any judgment entered on its basis will be binding on all members of the class who may not later second-guess it under ordinary principles of claim preclusion, see Restatement (Second) Judgments § 24 comments b, c; § 25 comments f, m; § 41(1)(e), (2) comment e, or, possibly, judicial estoppel, see *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982).

If this were not the approach taken, a foolproof means would be provided for irremediable fracturing of any such minority voter concentration. That cannot have been intended by Congress. A different situation of course would be presented if the class of black voters bringing such a dilution-by-fracturing claim included only the voters in one of the districts into which the fracturing had occurred. That is not this case.



Rights Act and for which preclearance is required under § 5 of that Act, 42 U.S.C. § 1973c.

The Attorney General's indication on April 27, 1982, that, so far as it affected covered counties, he would interpose no objection under § 5 to the legislative enactment of the redistricting plan which, *inter alia*, created House District No. 8 and Senate District No. 2 does not have the effect of precluding this claim by plaintiffs brought under amended § 2 to challenge the redistricting plan in respect of these two districts. 42 U.S.C. § 1973c; *Major v. Treen*, *supra*, slip op. at 200 n.1; *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n.9 (5th Cir. 1979); *see also Morris v. Gressette*, 432 U.S. 491, 506-07 (1977). Because the standards by which the Attorney General assesses voting changes under § 5 are different from those by which judicial claims under § 2 are to be assessed by the judiciary, *see* S. Rep. No. 97-417, *supra* note 10, at 68, 138-39, and because the former are applied in a non-adversarial administrative proceeding, the Attorney General's preclearance determination has no issue preclusive (collateral estoppel) effect in this action. *See* Restatement (Second) Judgments §§ 27 comment C; 83(2) & (3) (1980).

5. The meaning and intended application of amended § 2 of the Voting Rights Act in relation to the claims at issue in this action are as stated in Part II of this Memorandum Opinion.

6. On the basis of this court's ultimate findings of fact, the plaintiffs have established that the creation by the General Assembly of North Carolina of multi-member House Districts Nos. 8, 21, 23, 36 and 39, multi-member Senate District No. 22, and single-member Senate District No. 2 will, as applied, result in an abridgement of their voting rights, as members of a class protected by subsection (a) of amended § 2 of the Voting Rights Act, in violation of that section.

7. The plaintiffs are entitled to appropriate relief from the violation.

## V

## REMEDY

Having determined that the state's redistricting plans, in the respects challenged, are not in compliance with the mandate of amended § 2 of the Voting Rights Act, the court will enter an order declaring the redistricting plan violative of § 2 in those respects, and enjoining the defendants from conducting elections pursuant to the plan in its present form.

In deference to the primary jurisdiction of state legislatures over legislative reapportionment, *White v. Weiser*, 412 U.S. 783, 795 (1973), we will defer further action to allow the General Assembly of North Carolina an opportunity to exercise that jurisdiction in an effort to comply with § 2 in the respects required. This is especially appropriate where, as here, the General Assembly adopted the plan found violative of § 2 before the enactment of the amended version of that statute which now applies, and where there has accordingly been no previous legislative opportunity to assess the amended statute's substantial new requirements for affirmatively avoiding racial vote dilution rather than merely avoiding its intentional imposition.

Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class in the ways here found, or in other ways. *See In re: Illinois Congressional Districts Reapportionment Cases*, No. 81 C 1395, slip op. (N.D. Ill. 1981), *aff'd mem. sub nom.*, *Ryan v. Otto*, 454 U.S. 1130 (1982); *Rybicki v. State Board of Elections*, No. 81 C 6030 (N.D. Ill. Jan. 12, 1982); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

Recognizing the difficulties posed for the state by the imminence of 1984 primary elections, the court will convene at any time, upon request of the state, to consider and promptly to rule upon any redistricting plan that has been enacted by the

State in an effort to comply with the mandates of § 2 and with this decision. Failing legislative action having that effect within a reasonable time under the circumstances, not later than March 16, 1984, the court will discharge its obligation to develop and implement an appropriate remedial plan.

An appropriate order will issue.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

\_\_\_\_\_  
No. 81-803-CIV-5  
\_\_\_\_\_

RUFUS EDMISTEN, *et al.*,  
*Plaintiffs,*  
  
v.  
RALPH GINGLES, *et al.*  
*Defendants.*

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rufus L. Edmisten, et al., defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the final order and injunction entered in this action on January 24, 1984.

This appeal is taken pursuant to 28 USC § 1253.

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## APPENDIX C

SUPREME COURT OF THE UNITED STATES

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 No. A-774
 

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RUFUS EDMISTEN, *et al.*,*Appellants,*

v.

RALPH GINGLES, *et al.*


---

 ORDER
 

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UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including June 2, 1984.

/s/ Warren E. Burger  
 Chief Justice of the United States  
 WARREN E. BURGER

Dated this 28th  
 day of March, 1984.

## APPENDIX D

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fifteenth Amendment:

**Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**Section 2.** The Congress shall have power to enforce the article by appropriate legislation.

42 U.S.C. 1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973C:

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prere-

quisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, prac-

tice, or procedure, In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.



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No. 83-1968

Office - Supreme Court, U.S.

FILED

AUG 6 1984

ALEXANDER L. STEVENS

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

RUFUS L. EDMISTEN, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

**MOTION TO DISMISS OR AFFIRM**

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QUESTIONS PRESENTED

I. In this action brought under Section 2 of the Voting Rights Act, the District Court found as a matter of fact that, under the totality of relevant circumstances in North Carolina, the use of the challenged legislative districts results in black voters in those districts having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

Were these findings of fact clearly erroneous under Rule 52(a)?

II. Does administrative preclearance of a legislative district under Section 5 of the Voting Rights Act absolutely bar private



parties from litigating the legality of that district under Section 2 of the Voting Rights Act, in the face of clear statutory language to the contrary?

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No. 83-1968

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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RUFUS L. EDMISTEN, et al.,  
Appellants,

v.

RALPH GINGLES, et al.,

Appellees.

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On Appeal From the United States  
District Court For the Eastern  
District of North Carolina

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, Appellees,  
Ralph Gingles, et al., move that the Court  
dismiss the appeal or affirm the judgment  
below on the ground that the questions on

which the decision of the case depends are so unsubstantial as not to need further argument.

Statement of the Case

Appellees filed this action on September 16, 1981, challenging the 1981 apportionment of both houses of the North Carolina General Assembly ("the General Assembly") on the grounds, inter alia, that the apportionments were illegal and unconstitutional in that: (1) each had been enacted pursuant to provisions of the North Carolina Constitution which were required to be but had not been precleared under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c<sup>1</sup> ("§ 5 of the

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<sup>1</sup> Forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act.

Voting Rights Act" or "Section 5"); and (2) the use of multi-member districts illegally submerged minority population concentrations and diluted minority voting strength in violation of the Constitution and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

After the Complaint was filed, the State of North Carolina submitted the provisions of the North Carolina Constitution, which prohibit dividing counties in the formation of a legislative district, for preclearance under Section 5. The Attorney General, in a letter signed by William Bradford Reynolds, objected to the provisions, finding that the use of large multi-member districts "necessarily submerges cognizable minority population concentrations into larger white electorates." Jurisdictional Statement at 6a.

The Attorney General, acting through Reynolds, also found the 1981 House, Senate and Congressional plans, as well as two subsequent House plans and one subsequent Senate plan, to be racially discriminatory.

Despite warnings from special counsel, black citizens' groups, and various legislators that the use of multi-member districts could result in impermissible dilution of black citizens' voting strength, the General Assembly continued to use this method in the House and in the Senate. At an 8 day trial in July 1983 before all three judges, appellees challenged six of the multi-member districts, five in the House and one in the Senate. Appellees also challenged the configuration of one single member Senate District. Five of the challenged districts consist

entirely of counties not covered by Section 5 and, therefore, were not subject to the Attorney General's review.

On January 27, 1984, the Honorable J. Dickson Phillips, Jr., writing for the unanimous District Court, found that black citizens of North Carolina do not have an equal opportunity to participate in the State's political system and that use of the challenged legislative districts illegally minimizes their opportunity to elect representatives of their choice. The District Court made extensive and meticulous findings that there currently exists: a disparity between black and white voter registration which is a legacy of past intentional disfranchisement; severe socio-economic inequities which result from past discrimination and which give rise to a commonality of interests within geographically identifiable black communities;



minimal electoral success of black candidates; the use of racial appeals in campaigns; and a persistent failure of most white voters to vote for black candidates. In short, the Court found that, while there has been some progress, the gap between the ability to participate of white and black voters remains substantial.

Based on these findings the District Court entered a unanimous Order which declared that the apportionment of the General Assembly in six challenged multi-member districts and one single member district violate Section 2 of the Voting Rights Act, and enjoined elections in those districts pending court approval of a districting plan which does not violate Section 2.<sup>2</sup>

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<sup>2</sup> Appellees did not challenge all multi-member districts used by the State nor did the District Court rule that the use of multi-member districts is per se illegal. The District Court's Order leaves

Appellants' petition for a stay of the Order was unanimously denied by the District Court, and was subsequently denied by Chief Justice Burger, on February 24, 1984, and by the full Court on March 5, 1984.<sup>3</sup>

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untouched 30 multi-member districts in the House and 13 in the Senate. The District Court's Order did not affect 48 of North Carolina's 53 House of Representative Districts and did not affect 27 of North Carolina's 29 Senate Districts.

<sup>3</sup> By subsequent orders, the District Court approved the State's proposed remedial districts for six of the seven challenged districts, and primary elections have been held in those districts. The District Court has not acted on the Defendants' proposed remedial apportionment of one district, former House District No. 8, pending preclearance of defendants' proposal under Section 5.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT NORTH CAROLINA'S GENERAL ASSEMBLY DISTRICTS VIOLATE §2 OF THE VOTING RIGHTS ACT IS BASED ON THE CORRECT STANDARD AND IS NOT CLEARLY ERRONEOUS

A. The District Court Applied the Correct Standard in Determining That the Election Districts in Question Have a Discriminatory Result

Section 2 of the Voting Rights Act was amended in 1982, by the Voting Rights Amendments of 1982, 96 Stat. 131 (June 29, 1982), to provide that a claim of unlawful vote dilution is established if, "based on the totality of circumstances," members of a racial minority "have less opportunity than other members to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973, as amended. The Committee Reports accompanying the amendment make plain the

congressional intent to reach election plans that minimize the voting strength of minority voters. S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28 (1982) (hereafter "Senate Report" or "S.Rep."); H. R. Rep. No. 97-227, 97th Cong., 1st Sess. at 17-18 (1981) (hereafter "House Report").<sup>4</sup>

The Senate Report, at pages 27-30, sets out a detailed and specific road map for the application of the amended Section 2. When called upon to apply the statute, as amended, to a claim of unlawful dilu-

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<sup>4</sup> Appellants assert that the legislative history of the 1982 amendments is unclear because there is no conference committee report. J.S. at 8. However, as the House unanimously adopted S.1992, which had been reported out of the Senate Committee on the Judiciary and adopted by the Senate, there was no need for a conference committee or for a conference committee report. See J.S. at 9a, n.7. In fact there was no conflict between the intent of the House and of the Senate. The Senate adopted substitute language to spell out more specifically the standard which the House meant to codify. S. Rep. at 27.

tion, the federal courts were directed by Congress to assess the interaction of the challenged electoral mechanism with the relevant factors enumerated in the Senate Report at 28-29.

It is apparent from the analysis of Section 2 contained in the Memorandum Opinion and from the detailed assessment of the facts that the District Court understood and properly applied its Congressional charge to the facts of this case.

The actual standard applied by the District Court is embodied in its Ultimate Findings of Fact:

1. Considered in conjunction with the totality of relevant circumstances found by the court -- the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting, substantial to severe racial polarization in voting, the effects of thirty years of persistent racial appeals in political campaigns, a relatively depressed socio-economic status resulting in significant degree from a century of de jure and de facto segregation, and the continuing effect of a

majority vote requirement -- the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Considered in conjunction with the same circumstances, the creation of single-member Senate District No. 2 results in the black registered voters in an area covered by Senate Districts Nos. 2 and 6 having their voting strength diluted by fracturing their concentrations into two districts in each of which they are a voting minority and in consequence have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice. J.S. at 51a-52a.

Appellants assert that "the district court erred by equating a violation of Section 2 with the absence of guaranteed proportional representation." J.S. at 9. This statement, supported only by a sentence fragment from the opinion, J.S. at 9-10, grossly distorts the standard actually used by the District Court, and



ignores the extensive discussion by the District Court of the meaning and proper application of Section 2 of the Voting Rights Act. J.S. at 11a-18a. In that discussion, the District Court explicitly stated its interpretation of the standard to be applied and the factors to be considered:

In determining whether, "based on the totality of circumstances," a state's electoral mechanism does so "result" in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in White v. Regester and subsequently elaborated by the former Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam). These typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

[Thereafter the District Court listed the factors enumerated at pp. 28-29 of the Senate Report.] J.S. at 12a-13a.

The District Court did not ignore White v. Regester, 412 U.S. 755 (1973), and its progeny, nor did the District Court interpret those cases to require proportional representation. See J.S. 14a-15a. As the Court explicitly said, "[T]he fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population [does not establish that vote dilution has resulted]." J.S. at 15a.

In sum, the District Court examined each factor specified by Congress in the Senate Report and, without limiting its assessment to just one factor, as appellants do, assessed them as a totality.<sup>5</sup> The

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<sup>5</sup> The Courts of other circuits, as did the Court below, have interpreted the amended Section to require the trial court

District Court clearly engaged in the Congressionally mandated analysis and applied the proper standard.

B. The District Court's Ultimate and Subsidiary Findings of Fact Are Not Clearly Erroneous

1. The Court Weighed The Particular Circumstances Relevant To This Action In Making Its Findings

Since the District Court applied the proper standard to the facts before it, the real question raised by appellants is whether the three judges properly weighed

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to examine the factors listed at pages 28-29 of the Senate Report and, considering the totality of the circumstances, determine whether the challenged election method violates Section 2. U.S. v. Marengo County Comm., 731 F.2d 1546, 1565-1566 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 384-385 (5th Cir. 1984); Velasquez v. City of Abilene, Tex., 725 F.2d 1017, 1022-23 (5th Cir. 1984); Rybicki v. State Bd. of Elections, 574 F. Supp. 1147, 1148-50 (E.D. Ill. 1983)(three judge court).

the voluminous evidence. While the judges heard eight days of testimony, examined hundreds of documents, and made thirty-three pages of factual findings, the appellants base their argument, in essence, on one fact: the electoral success of a few black candidates in 1982. The question thus raised is whether, in assessing the totality of circumstances, the District Court's judgment as to the proper weight to give to this fact is clearly erroneous.<sup>6</sup>

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<sup>6</sup> Rule 52(a), F.R.Civ.P., provides that neither the ultimate nor the subsidiary findings of fact of the District Court may be reversed unless they are clearly erroneous. Rogers v. Lodge, 458 U.S. 613, 622-623, 627 (1982) (clearly erroneous standard applies to finding that an at large voting system is being maintained for a discriminatory purpose and to the underlying subsidiary findings); Pullman-Standard v. Swint, 456 U.S. 273, 287-293 (1982). See also Velasquez v. City of Abilene, Tex., 725 F.2d 1017, 1021 (5th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 380 (5th Cir. 1984).

The District Court analyzed each of the factors suggested by Congress to determine its bearing on the ability of black citizens to elect candidates of their choice to the General Assembly. One factor is the extent of black electoral success. With regard to that factor, it is plain that before this action was commenced in 1981, a nominal number of blacks had been elected to the General Assembly. The District Court discussed the 1982 elections and found them to be uncharacteristic. After examining black electoral successes and failures, Judge Phillips concluded:

[T]he success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state

-- either generally or specifically in the areas of the challenged districts.

J.S. at 37a-38a. See also, J.S. at 37a n.27.

This conclusion was considered along with findings on the other factors enumerated in the Senate Report. These are summarized as follows:

a. There is a current disparity in black and white voter registration resulting from the direct denial and chilling by the State of registration by black citizens, which extended officially into the 1970's with the use of a literacy test and anti-single shot voting laws and numbered seat requirements. The racial animosities and resistance with which white citizens have responded to attempts by black



citizens to participate effectively in the political process are still evident today. J.S. at 22a-26a.

b. Within each challenged district racially polarized voting is persistent, severe, and statistically significant. J.S. at 38a-39a, 46a.

c. North Carolina has a majority vote requirement which exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts. J.S. at 29a-30a.

d. North Carolina has a long history of public and private racial discrimination in almost all areas of life. Segregation laws were not repealed until the late 1960's and early 1970's. Public schools were not significantly desegregated until the early 1970's. Thus, blacks over 30 years old attended qualitatively inferior segregated schools. Virtually all neigh-

borhoods remain racially identifiable, and past discrimination in employment continues to disadvantage blacks. Black households are three times as likely as white households to be below poverty level. The lower socio-economic status of blacks results from the long history of discrimination, gives rise to special group interests, and currently hinders the group's ability to participate effectively in the political process. J.S. at 25a-29a.

e. From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been used effectively as a means of influencing voters in North Carolina. As recently as 1983, political campaign materials reveal an unmistakable intention to exploit white voters' existing racial fears and prejudices and to create new ones. J.S. at 31a-32a.

f. The extent of election of blacks to public office at all levels of government is minimal, and black candidates continue to be at a disadvantage. With regard to the General Assembly in particular, black candidates have been significantly less successful than whites. J.S. at 33a-34a, 37a-38a.

g. The State gave as its reason for the multi-member districts its policy of leaving counties whole in apportioning the General Assembly. However, when the challenged apportionments were enacted, the State's policy was to divide counties when necessary to meet population deviation requirements or to obtain Section 5 preclearance. Many counties were divided. The policy of dividing counties to resolve some problems but not others does not justify districting which results in racial vote dilution. J.S. at 49a-50a.

The District Court included the extent to which blacks have been elected to office as "one circumstance" to be considered, 42 U.S.C. §1973(b), made an intensely local and detailed appraisal of all of the relevant circumstances, and determined that the challenged districts have a discriminatory result.

For this Court to reverse the District Court's ultimate findings would require this Court to find (1) that the District Court's assessment of pre-1982 electoral success was clearly erroneous; (2) that the District Court's assessment that the 1982 elections were atypical was clearly erroneous; and (3) that, in weighing the totality of the circumstances, the relative weight given by the Court to one post litigation election year was clearly erroneous.

2. The District Court's Finding  
of Racially Polarized Voting is  
Not Clearly Erroneous.

Appellants assert that the electoral success of some blacks in 1982 precludes the District Court from finding severe racially polarized voting. This is the only subsidiary finding appellants challenge.<sup>7</sup>

In finding voting to be racially polarized, the District Court engaged in a detailed analysis of election returns from each of the challenged districts extending over several elections, supported by the testimony of numerous lay witnesses and

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<sup>7</sup> Although appellants challenge this finding as an error of law, the finding of racially polarized voting is one of fact covered by Rule 52(a). Jones v. Lubbock, 727 F.2d at 380. Appellants apparently limit this challenge to those areas not covered by §5. They do not discuss facts from either House District No. 8 (Wilson, Edgecombe, and Nash Counties) or Senate District No. 2.

expert testimony regarding every election for the General Assembly in which there had been a black candidate in the challenged multi-member districts for the three election years preceding the trial. J.S. 38a-39a. Based on its exhaustive analysis of the evidence, the District Court found that racially polarized voting was severe and persistent.

Appellants erroneously claim that the District Court determined racial polarization by labeling every election in which less than 50% of the whites voted for the black candidate as racially polarized. J.S. at 17. Although it is true that no black candidate ever managed to get votes from more than 50% of white voters, this is not the standard the District Court used.

Instead, the District Court examined the measurement of racially polarized voting to determine the extent to which



black and white voters vote differently from each other in relation to the race of the candidates. J.S. at 39a, n.29. The District Court's assessment can be summarized in three findings:

a. The evidence shows patterns of racial polarization. The Court found:

On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested.

J.S. at 40a.

b. The correlation between the race of the voter and the race of the candidate voted for was statistically significant at the .00001 level in every election analyzed. Although correlation coefficients above an absolute value of .5 are relatively rare and those above .9 are extremely rare, all correlation coefficients in this case were between .7 and .98 with most above .9. J.S. at 38a-39a and n.30.

c. In all but two elections, the black candidate lost among white voters --that is the results of the election would have been different if held only in the white community than if held only in the black community. J.S. at 39a-40a and n.31. The District Court used the term "substantively significant" in these circumstances. Appellants posited

no alternative definition supported either by case law or political science literature. J.S. at 40a, n.32.

Appellants offered no statistical analysis which contradicted the conclusions of the District Court. They did not question the accuracy of the data or assert that the methods of analysis used by appellees' expert were not standard in the literature. J.S. at 38a n.29. In fact, appellants conceded that the polarization of the voting was statistically significant for each of the elections analyzed.

Nonetheless, appellants contest the District Court's finding of racially polarized voting citing examples from only one post-litigation election year, 1982. This is particularly inappropriate, as the District Court concluded that 1982 was "obviously aberrational"

and that whether it will be repeated is sheer speculation. Among the aberrational factors was the pendency of this lawsuit and the one time help of black candidates by white Democrats who wanted to defeat single member districts. J.S. at 37a. This skeptical view of post-litigation electoral success is supported by the legislative history of the Voting Rights Act and the case law. Senate Report at 29, n.115; Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc) aff'd on other grounds sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976); NAACP v. Gadsden Co. School Board, 691 F.2d at 983.

In addition to being drawn only from post-litigation elections, the examples given by appellants are misleading and are taken out of context. For example:

(a) Appellants point out that in the 1982 Mecklenburg House primary, black candidate Berry received 50% of the white vote. The District Court noted this but stated that it "does not alter the conclusion that there is substantial racially polarized voting in Mecklenburg County in primaries. There were only seven white candidates for eight positions in the primary and one black candidate had to be elected. Berry, the incumbent chairman of the Board of Education, ranked first among black voters but seventh among whites." J.S. at 42a.

The other black candidate, Richardson, was ranked last by white voters in the primary but second, after Berry, by blacks. In the general election, Richardson was the only Democrat who lost.

Similarly, in the 1982 Mecklenburg County Senate race, the black candidate who was successful in the primary was the only Democrat who lost in the general election, ranking first among black voters but sixth out of seven by white voters for four seats.

b. Appellants point out that black candidate Spaulding received votes from 47% of white voters in the 1982 general election in Durham County. They neglect to point out there was no Republican opposition in that election, and that a majority of white voters therefore



failed to vote for the black incumbent even when they had no other choice. J.S. at 44a.

Appellants also failed to point out that in the Durham County primary for 1982 there were only two white candidates for three seats so at least one black had to win. As the District Court noted, "Even in this situation, 63% of white voters did not vote for the black incumbent, the clear choice of the black voters." J.S. at 44a.

(c) Appellants point out that in Forsyth County two black candidates in 1982 were successful but fail to note, as the District Court did, that white voters ranked the two black candidates seventh and eighth out of eight candidates for five seats in the general election while black voters ranked them first and second. J.S. at 43a.

(d) As another example, while noting that black elected incumbents have been re-elected, appellants fail to note that white voters almost always continue to rank them last and that black appointed incumbents have uniformly been defeated.

The three judges who heard the evidence considered each of the facts which appellants point out, together with the surrounding circumstances, and concluded that these pieces do not alter the conclusion of severe and persistent racially polarized voting.

Appellants also assert that racially polarized voting is probative of vote dilution only if it always causes blacks to lose. In fact, in 21 of the 32 election contests analyzed in which the black candidate received substantial black support, the black

candidate did lose because of racial polarization in voting. That is, he lost even though he was the top choice of black voters because of the paucity of support among white voters.

Appellants assert that whites must uniformly win for racially polarized voting to be probative. They support this argument by citing Rogers v. Lodge, supra, a case decided under the purpose standard of the Fourteenth Amendment of the United States Constitution. Appellees do not believe that Rogers v. Lodge stands for the proposition boldly asserted by appellants, but the Court need not consider, in the context of this case, whether the complete absence of black electoral success is necessary to raise an inference that an at large system is being maintained for a discriminatory purpose.

The instant case was decided under the Voting Rights Act, and the statutory language of Section 2 specifies that a violation exists if black citizens have "less opportunity" to elect representatives of their choice; it is not limited to situations in which black candidates have absolutely no chance of being elected. 42 U.S.C. § 1973(b). Racially polarized voting can give rise to this unequal opportunity, even if it does not cause black candidates to lose every single election.

Appellants' argument is, in essence, that any black electoral success necessarily defeats a Section 2 claim, an argument which defies the intent of Congress. See S. Rep. at 29, n.115, and discussion at p. 35, infra.

As the Court noted in Major v. Ireen, 574 F.Supp. 325, 339 (E.D. La. 1983) (three judge court):

Nor does the fact that several blacks have gained elective office in Orleans Parish detract from plaintiffs' showing of an overall pattern of polarization... Racial bloc voting, in the context of an electoral structure wherein the number of votes needed for election exceeds the number of black voters, substantially diminishes the opportunity for black voters to elect the candidate of their choice.

The District Court considered all of the evidence, including the facts to which the appellants allude, and determined that racially polarized voting is severe and persistent in the districts in question. This finding is not clearly erroneous.

3. The District Court's Ultimate Finding of Discriminatory Result is Not Clearly Erroneous

The task of the three District Court judges was to examine historic and current racial and political realities in North Carolina, to determine if the challenged legislative districts operate to deny black citizens an equal opportunity to elect representatives to the General Assembly. The judges below engaged in an intensely local appraisal of these factors and appellants ask this Court to rule that their determination was clearly erroneous.

Appellants do not challenge the lower court's findings on six of seven Section 2 factors, and, as discussed in part IB(2), supra, the seventh subsidiary finding, that voting in North Carolina is racially polarized, is not clearly erroneous. Thus, the question is whether the District Court



properly assessed the totality of circumstances. In the Statement of the Case appellants recite random black electoral successes and then imply, without saying, that under the circumstances, a finding of discriminatory result is erroneous because it is tantamount to a requirement of proportional representation.

As was discussed in part IB(1), supra, the District Court did not ignore the election of blacks in its weighing of the facts. Rather, after examining the extent of minority election, the District Court found, in addition to minimal election of blacks to the General Assembly before this litigation was initiated, that in the six multi-member districts in question, black candidates who won Democratic primaries between 1970 and 1982 were three times as

likely to lose in general elections as were their white Democratic counterparts. J.S. at 33a-34a.

In addition, the District Court found that blacks hold only 9% of city council seats (many from majority black election districts); 7.3% of the county commission seats; 4% of sheriff's offices; and 1% of the offices of the Clerk of Superior Court. No black has been elected to statewide office except three judges who ran unopposed as appointed incumbents. No black has been elected to the Congress of the United States as a representative of this state.<sup>8</sup> J.S. at 33a.

On a county by county basis appellants also paint a lopsided picture. In Forsyth County appellants specify isolated instances of electoral success but ignore

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<sup>8</sup> North Carolina is 22.4% black in population.

electoral failures such as: (1) the defeat of appointed black incumbents which resulted in no blacks being elected to the House of Representatives from Forsyth County in 1978 and 1980, years in which all white Democrats were successful; (2) the defeat in 1980 of the black who had been elected to the County Commission in 1976 which resulted in a return to an all white County Commission; and (3) the defeat in 1978 and 1980 of the black who had been elected to the Board of Education in 1976 returning the Board of Education to its previous all white status.

In each of these instances the evidence showed that black Democrats were defeated when white Republicans did well, but white Democrats won consistently, even in good Republican years.

In addition, appellants do not mention that House District No. 8, which is 39% black in population and has four representatives, has never elected a black representative, J.S. at 36a, or that Mecklenburg County, which, with eight House seats and four Senate seats, is the largest district in the General Assembly and which is over 25% black in population, has this century elected only one black senator (from 1975-1979) and one black representative (in 1982, after this lawsuit was filed). J.S. at 34a.

In Mecklenburg County, as in Forsyth County, black Democrats who were successful in Democratic primaries, in the House in 1980 and 1982 and in the Senate in 1982, were the only Democrats to lose to white Republicans. No white Democrat lost to a Republican in those elections.<sup>9</sup>

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<sup>9</sup> Thus, this case is in no way similar

Rather than requiring guaranteed election, and rather than simplistically considering erratic examples of electoral success, the District Court followed the statutory mandate by considering black electoral success and failure as one factor in the totality of circumstances leading to its conclusion of discriminatory result. 42 U.S.C. § 1973(b).

Other courts have not required the complete absence of black electoral success in order to find a violation of Section 2. United States v. Marengo County Commission, 731 F.2d at 1572; Major v. Ireen, 574 F.Supp. at 351-352; Rybicki v. State Bd. of Elections, 574 F.Supp. at 1151 and n.5. This interpretation of the amended §2 is consistent with pre-amendment case law

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to Whitcomb v. Chavis, 403 U.S. 124, 150-152 (1971), in which black defeat was caused by Democratic Party defeat, not by race.

which held that some black electoral success does not preclude a finding of dilution. See White v. Regester, 412 U.S. at 766; NAACP v. Gadsden Co. School Board, 691 F.2d at 983; Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir. 1977).

The conclusion of the District Court, that the election of some minority candidates does not negate a finding of discriminatory result, is consistent with the clear intent of Congress as stated in the Senate Report: "[T]he election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section." S. Rep. at n.115.

The determination of whether an electoral system has an illegal discriminatory result requires findings of fact which blend "history and an intensely local



appraisal of the design and impact of the ... multi-member district in the light of past and present reality, political and otherwise." White v. Regester, 412 U.S. at 769-770. The District Court in this action engaged in just this "intensely local appraisal." The District Court's findings are so meticulously supported by the record as to warrant summary affirmance by this Court.

## II. THE DISTRICT COURT PROPERLY CONSIDERED ALL THE STATE'S EVIDENCE

Appellants dispute the weight the District Court gave to evidence that a handful of black voters and a few black and white politicians disagreed with the single member district remedies proposed by plaintiffs.

In their Jurisdictional Statement appellants allude to the testimony of one black legislator and some white politicians who supported retention of the multi-member redistricting plans under which they were elected and to the testimony of three black witnesses who testified in opposition to single member districts.

Appellants characterize this evidence as substantial, J.S. at 21, and urge that the Court below erroneously disregarded it. In fact the District Court carefully evaluated the testimony of all the State's witnesses as a factor bearing upon the claim of racial vote dilution. J.S. at 47a-48a. The Court found that the black witnesses who testified for the State were a "distinct minority" whose views "went almost exclusively to the desirability of the remedy sought by plaintiffs, and not to

the present existence of a condition of vote dilution." Id. This finding is amply supported by the record.

The appellants erroneously contend that in evaluating a claim of racial vote dilution, the District Court should have found that evidence that the plaintiffs' proposed remedy was not unanimously endorsed by every member of the black or white community outweighed all other evidence of the objective factors identified as relevant by Congress. This is fundamentally inconsistent with the Congressional mandate in amending Section 2 to eliminate racial vote dilution. It does not raise a substantial question. Compare Swann v. Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1291, 1293 (W.D. N.C. 1969) aff'd, 402 U.S. 1 (1971). Cf.

Cooper v. Aaron, 358 U.S. 1, 16 (1958);  
Monroe v. Bd. of Commissioners, 391 U.S.  
450, 459 (1968).

III. PRECLEARANCE UNDER SECTION  
5 OF THE VOTING RIGHTS  
ACT DOES NOT BAR APPELLEES'  
CLAIM UNDER SECTION 2

Appellants rely on the decision by the Assistant Attorney General of the United States to preclear the House and Senate reapportionments pursuant to Section 5 of the Voting Rights Act to contend that - appellees (plaintiffs below) were estopped or precluded from pursuing their Section 2 claims in those districts composed of

counties covered by Section 5.<sup>10</sup> This argument is specious, and was rejected by the District Court for three reasons:

(1) The statute expressly contemplates a de novo statutory action by private plaintiffs; (2) The substantive standard for a violation of Section 5 is not coterminous with the substantive standard under Section 2; and (3) Section 5 preclearance is an ex parte non-adversarial process that has no collateral estoppel effect.

Section 5 of the Voting Rights Act expressly contemplates a de novo action such as in the instant case:

Neither an affirmative indication by the Attorney General that no objection will be made nor the Attorney General's failure to object, nor a declaratory

<sup>10</sup> This argument is limited to House District #8 and Senate District #2, the only districts composed of counties covered by Section 5.

judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. § 1973c.

The statute does not limit such actions to purely constitutional claims or contain any qualifications barring Section 2 actions.<sup>11</sup>

Private plaintiffs are entitled to bring a subsequent action whether preclearance results from "a declaratory judgment entered under this section" or from "an affirmative indication by the Attorney General that no objection will be made."

Id. Moreover, the language in Section 5

<sup>11</sup> Appellants were so informed by the Assistant Attorney General in his April 30, 1982 preclearance letter to the State: "Finally," he wrote, "we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes."



should be viewed in the light of the recent amendments to Section 2, in which Congress made clear that private citizens have a statutory cause of action to enforce their rights in both Section 5 covered and uncovered jurisdictions. See House Report at 32; Senate Report at 42. Plaintiffs are therefore not barred from mounting a de novo statutory or constitutional attack upon a reapportionment plan notwithstanding preclearance. Major v. Ireen, supra, at 327 n.1, citing United States v. East Baton Rouge Parish School Bd., 594 F.2d 56, 59 n.9 (5th Cir. 1977).

Secondly, the failure of the Attorney General to object under Section 5 cannot be probative of whether there is a Section 2 violation unless the standards under these two sections of the Voting Rights Act are the same. There is nothing in the record which demonstrates what standard the

Attorney General used in preclearing House District #8 or Senate District #2. It is particularly ambiguous since these two districts were precleared in April 1982, two months before the 1982 extension and enactment of amendments to Section 2. It is manifest, however, that the Attorney General did not use the standard of a statute yet to be enacted.

In addition, the legislative history of the amendment of Section 2 suggests that the use of the word "results" in the statute distinguishes the standard for proving a violation under the Section 2 totality of circumstances test from the Section 5 regression standard for determining discriminatory purpose or effect. Senate Report at 68 and n.224; 2 Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate

Comm. on the Judiciary, 97th Cong., 2d Sess. 80 (1982) (remarks of Sen. Dole), 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner, with which Rep. Edwards concurs).

In short, nothing in the statute itself, in the legislative history of the recent amendment of Section 2, in the case law of collateral estoppel,<sup>12</sup> or in the

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<sup>12</sup> There are four criteria that must be established before the doctrine of collateral estoppel can be invoked. 1) The issue sought to be precluded must be the same as that involved in the prior litigation, 2) the issue must have been actually litigated, 3) it must have been determined by a valid and final judgment, and 4) the determination must have been essential to the judgment. See generally, Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 4416 et. seq; Allen v. McCurry, 449 U.S. 90 (1980). The party asserting estoppel has the burden of proving all elements of the doctrine, especially the existence of a full and fair opportunity to litigate the issue. Id. at 95. Matter of Merrill, 594 F.2d 1064, 1066 (5th Cir. 1979); Kremer v. Chemical Construction Corporation, 456 U.S. 461, 481 (1982): "Redetermination of issues is warranted if there is reason to doubt the quality extensiveness, or fairness of pro-

treatment of other administrative agency determinations where there is a statutory right to trial de novo,<sup>13</sup> supports appellant-

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cedures followed in prior litigation." Even if all criteria are satisfied, relitigation may be appropriate because of the potential import of the first determination on the public interest or the interest of persons not parties to the original action. Porter and Dietsch, Inc. v. F.I.C., 605 F.2d 294, 300 (7th Cir. 1979) cert. denied, 445 U.S. 950 (1979).

<sup>13</sup> This Court has held that a Title VII plaintiff's statutory right to a trial de novo is not foreclosed by submission of the claim to final arbitration, Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974), even though the complainant is a party to the administrative proceeding. Similarly, a federal employee whose employment discrimination claims were rejected by the Veterans Administration and the Civil Service Commission Board of Appeals and Review was nevertheless entitled to a trial de novo. Chandler v. Roudebush, 425 U.S. 840 (1976). Moreover, although admissible as evidence at the de novo proceeding, the agency decision was entitled only to the weight deemed appropriate by the court. Alexander v. Gardner-Denver, 415 U.S. at 59-60.

s' claim that Section 5 preclearance precludes subsequent litigation of a violation under section 2.

The nature of the administrative preclearance process itself exposes the vacuity of appellants' preclusion argument. Appellants concede that the Section 5 review was conducted ex parte as a nonadversary proceeding.<sup>14</sup> There was no formal hearing consistent with fundamental

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<sup>14</sup> Jurisdictional Statement at 16: "In fact, these districts were designed by counsel and legislative drafters in daily contact with the Assistant Attorney General and members of the staff of the Civil Rights Division." Indeed, other than this admission, the record is devoid of the reasoning or facts behind the Assistant Attorney General's ultimate preclearance decision. In his preclearance letters, the Assistant Attorney General never even mentions House District 8 and there is absolutely nothing in the record to support appellants' claim that the Attorney General determined "that it was in the best interests of the black voters not to diminish black influence in (Senate) District 6 in order to 'pack' (Senate) District 2." J.S. at 16-17.

notions of due process,<sup>15</sup> and, unlike appellants, who were in "daily contact with the Assistant Attorney General," J.S. at 16, appellees could not be and were not parties to the preclearance determination. Nor were appellees entitled to appeal or in any form seek judicial review of the preclearance decision. Morris v. Gressette, 432 U.S. 491 (1977).

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<sup>15</sup> The Justice Department Section 5 regulations provide that a covered jurisdiction must submit voting changes for preclearance review, but the reviewing official is not required to publish an opinion nor set forth reasons for the preclearance decision. See 28 CFR §51.41. The procedure is so informal that a determination may be made without the Justice Department taking any definitive action at all. If a state submits a plan and the Department takes no action within sixty days, the plan is presumptively approved. *Id.* A conference may be requested by the submitting jurisdiction on reconsideration of an objection, 28 CFR §51.46, but none is required initially. Parties opposing preclearance have no formal role in the deliberations.



Morris v. Gressette arose in the context of a claim that private plaintiffs had a right to judicial review of the administrative preclearance process. In holding that private parties had no such right to inquire into the reasoning behind the Attorney General's decision, to review the process by which he considered the change or to appeal directly his determination, this Court was persuaded that Congress had provided, through the statutory grant of a trial de novo, for black voters who disagree with the preclearance decision and who have no other means of protecting their interests. Morris v. Gressette, 432 U.S. at 506-07. Indeed, this is directly stated in the only other case, Donnell v. United States, 682 F.2d 240, 247 (D.C. Cir. 1982), which appellants cite to support their claim of pre-emption.

Neither Donnell nor Morris v. Gres-

sette supports the appellants' preclusion arguments. Indeed, they affirmatively recognize that the Attorney General may have interests other than the interests of minority voters and, more importantly, that the voters' interests are explicitly protected by the statutory right to a trial de novo.

Thus, the District Court properly found the Attorney General's preclearance determination "has no issue preclusive (collateral estoppel) effect in this action." (Citation omitted) J.S. at 54a. The decision below should be affirmed summarily.

### CONCLUSION

Because appellants did not raise any substantial question which requires further argument, the Court should affirm the judgment of the District Court or dismiss the appeal.

Respectfully submitted

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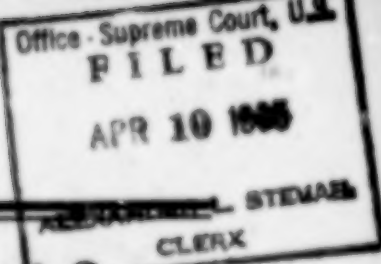
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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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LACY H. THORNBURG, ET AL., APPELLANTS

v.

RALPH GINGLES, ET AL.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

---

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## QUESTIONS PRESENTED

1. Whether preclearance of a redistricting plan by the Attorney General pursuant to Section 5 of the Voting Rights Act precludes subsequent adjudication by private plaintiffs of the validity of the plan under Section 2 of the Voting Rights Act.

2. Whether the district court correctly construed amended Section 2 of the Voting Rights Act as invalidating certain multi-member legislative districts in which minority candidates had achieved significant electoral successes.

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## In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS

v.

RALPH GINGLES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

The Solicitor General submits this brief in response to the Court's order inviting a brief expressing the views of the United States regarding this appeal.

## STATEMENT

1. In July 1981, as a result of the 1980 census, the General Assembly of the State of North Carolina enacted redistricting plans for the state's House of Representatives and Senate. In September 1981, appellees filed suit in the United States District Court for the Eastern District of North Carolina, alleging that the districting plans had been enacted pursuant to provisions of the North Carolina Constitution that required, but had not received, preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that the use of large multi-member districts submerged concentrations of black voters and diluted minority voting strength in violation of the Constitution and Section 2 of the Voting Right Act of 1965, 42 U.S.C. (1976 ed.) 1973 (J.S. 3a-4a). The state constitutional provision to which the suit referred was a provision adopted in 1968 prohibiting



the division of counties for the purpose of creating electoral districts.

After this action was filed, the State submitted its constitutional provision for Section 5 clearance (J.S. App. 6a). While this submission was pending, the General Assembly passed a revised redistricting plan for the House, leaving the Senate plan untouched (*ibid.*). In November 1981, the Attorney General interposed an objection pursuant to Section 5 to the constitutional provision against dividing counties. The objection stated that the provision required the use of large multimember districts and that this "necessarily submerges cognizable minority population concentrations into larger white electorates" (*ibid.* (citation omitted)). Thereafter, on December 7, 1981, and January 20, 1982, the Attorney General objected to the Senate and House plans. The Attorney General's review pertained only to the 40 North Carolina counties (out of 100) that are covered jurisdictions for purposes of Section 5. See § 4, 42 U.S.C. 1973b.

On February 11, 1982, the General Assembly enacted revised Senate and House plans, to which the Attorney General again interposed objections on April 19, 1982. The objections pertained to Senate District 2, which had been drawn to encompass fewer black voters than Section 5 required, and to a proposed House district for Cumberland County, which submerged a cognizable black population in a large multimember district. See J.S. App. 6a-7a. On April 27, 1982, the General Assembly enacted the redistricting plans that are the subject of this litigation. Both the House and Senate plans were precleared by the Attorney General on April 30, 1982. *Id.* at 7a.

2. After the districting plans were adopted, appellees amended their pleadings to challenge five newly-adopted House districts and two Senate districts, and to conform to the newly-amended Section 2. Only two of the districts—House District 8 and Senate District 2—were subject to and had received preclearance under Section 5 of the Voting Rights Act. Each of the other, unprecleared, districts is a multimember district. The "gravamen" of

appellees' claim with reference to these multimember districts, as explained by the district court (J.S. App. 4a),

is that the plan makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts, \* \* \* all in a manner that violates rights of the plaintiffs secured by section 2 of the Voting Rights Act of 1965.

The case was tried before a three-judge court on the basis of extensive stipulations of fact, documentary evidence, and oral testimony taken during eight days in July and August 1983 (J.S. App. 8a). On January 27, 1984, the court entered an order and opinion containing extensive findings on the various factors identified in the legislative history and prior caselaw as relevant to a vote dilution claim. See J.S. App. 21a-51a. The court held that, under the totality of the relevant circumstances, the redistricting plan in all seven challenged districts denied black citizens an equal opportunity to participate in the political process in violation of Section 2 of the Voting Rights Act, and enjoined elections in the challenged districts.<sup>1</sup> In reaching this ultimate conclusion, the district court set forth the following interpretation of amended Section 2 (42 U.S.C. 1973) (J.S. App. 14a-15a (citation omitted)):

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority

<sup>1</sup> The district court denied the State's petition for a stay, as did the Chief Justice on February 24, 1984, and the full Court on March 5, 1984. The State has since adopted, under protest, a plan that has been approved by the district court in all respects. The district court deferred decision on House District 8 pending preclearance by the Attorney General. On October 1, 1984, the Attorney General objected to the revised plan for House Districts 8 (three member) and 70 (single member). On November 16, 1984, the Attorney General precleared plans for those districts, and the court ordered their implementation.

with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior.

3. The district court also reviewed at length the racial demographics and voting history of each challenged multi-member district.

*House District 21.* House District 21, in Wake County, elects six representatives to the General Assembly on an at-large basis. The population of the district is 21.8% black,<sup>2</sup> and black voters constitute 15.1% of all registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw one single-member legislative district within the present boundaries of District 22, with a black population of 67% (*id.* at 20a). Under the challenged plan and its predecessor (which was substantially the same (*id.* at 19a)), one black legislator was elected in 1980 and reelected in 1982 (*id.* at 35a). In those elections, respectively, he received the votes of 31% and 39% of the white voters in the primary, and the votes of 44% and 45% of the white voters in the general election (*id.* at 44a).

*House District 23.* House District 23, in Durham County, elects three at-large representatives to the General Assembly. The population of the district is 36.3% black, and black voters constitute 28.6% of the registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw one single-member legislative district within the present boundaries of District 23, with a black population of 70.9% (*id.* at 20a). Under the challenged plan and its predecessor, one of the three district representatives has been black, every year since 1973 (*id.* at 35a). The black leg-

<sup>2</sup> The district court did not have available data on the voting age population of the challenged districts, which is the preferred measure. *Wyche v. Madison Parish Policy Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981).

islator was unopposed in the general election in 1978, and in both primary and general elections in 1980. In 1978, he was elected with 16% of the white vote in the primary, and in 1982, he received 37% of the white vote in the primary and 43% of the white vote in the general election. A second black candidate also garnered 26% of the white vote in the 1982 primary. *Id.* at 43a-44a.

*House District 36.* House District 36, in Mecklenburg County, has an eight-member House delegation, elected at large. The population of the district is 26.5% black, and black voters make up 18% of the registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw two single-member legislative districts that would be 66.1% and 71.2% black (*id.* at 20a). Under the present plan, one black representative was elected in 1982; he is the first black citizen to be elected to the House from Mecklenburg County in this century (*id.* at 34a). He received 50% of the votes of white voters in the primary election, and 42% in the general election (*id.* at 41a). A second, unsuccessful, black candidate received 39% of the white vote in the 1982 primary and 29% in the general election.<sup>3</sup>

*House District 39.* House District 39, in a part of Forsyth County, has five at-large seats in the General Assembly. The population of the district is 25.1% black, and 20.8% of the registered voters are black (J.S. App. 19a). The black population is so situated that one single-member legislative district, with a 70.0% concentration of black voters, could be drawn (*id.* at 20a). Under the challenged plan, two of the five representatives elected in 1982 were black; under the predecessor plan, a black representative was elected in 1974 and reelected in 1976 (*id.* at 35a). The two black representatives elected in 1982 received 25% and 36% of the white vote in the primary election, and 42% and 46% in the general elec-

<sup>3</sup> In addition, the district court observed that a black citizen has been elected mayor of the City of Charlotte, receiving 38% of the white vote in the general election against a white Republican (J.S. App. 35a).



tion (*id.* at 43a). One of these representatives had previously won the Democratic nomination in 1978 and 1980 (with 28% of the white vote in 1978 and 40% of the white vote in 1980), but lost the general election in those years (*id.* at 42a-43a).

*Senate District 22.* Senate District 22, in Mecklenburg and Cabarrus Counties, is a four-member district. The population is 24.3% black, and 16.8% of the registered voters are black (J.S. App. 19a). The black population is so situated that one single-member district could be created with a 70.0% black population (*id.* at 20a). Under the present plan, no black Senator is part of the district delegation; however, one black citizen was elected from 1975-1980 (*id.* at 34a). The black senatorial incumbent (Alexander) received 47% of the white votes in the primary election in 1978 and 41% in the general election; his share of the white vote dropped to 23% in the 1980 primary. A second black candidate (Polk), running in 1982, garnered 32% of the white votes in the primary and 33% in the general election. *Id.* at 42a.

### ARGUMENT

1. Appellants' second question presented is not, in our view, substantial. Appellants' challenge to the district court's invalidation of House District 8 and Senate District 2 is based solely on the ground that, since these districts had been precleared by the Attorney General pursuant to Section 5 of the Act, 42 U.S.C. 1973c, they are therefore not subject to challenge in court under Section 2, 42 U.S.C. 1973. This position, however, is contrary to the plain language of the statute, has been rejected by this Court in closely analogous circumstances, and is inconsistent with general principles of collateral estoppel. As to these districts, the Court should summarily affirm the judgment of the district court.

Section 5 of the Voting Rights Act expressly contemplates that judicial actions may be brought to enjoin election practices that have received Section 5 preclearance from the Attorney General. It states (42 U.S.C. 1973c):

Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

In *Morris v. Gressette*, 432 U.S. 491, 505 (1977), this Court interpreted that language to mean that a private plaintiff could challenge the constitutionality of a voting plan notwithstanding the Attorney General's preclearance decision. There is no reason to suppose that a statutory challenge would be barred where a constitutional challenge is not. See *Major v. Truen*, 574 F. Supp. 325 (E.D. La. 1983); *Seamon v. Upham*, No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), *aff'd summarily sub nom. Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984).<sup>4</sup>

In any event, collateral estoppel can only prevent parties from relitigating an issue they have previously litigated unsuccessfully in another action. *United States v. Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4, 5 n.4. It is thus difficult to understand how preclearance by the Attorney General in an administrative process to which appellees were not parties could collaterally estop these plaintiffs from asserting their rights in court.<sup>5</sup>

Nor do we believe that appellants' fourth question—whether the district court erroneously rejected certain evidence—is substantial. The district court did not exclude the evidence, but simply gave it less weight than

<sup>4</sup> This interpretation was pointed out to the State in the Attorney General's April 30, 1982 preclearance letter, which stated:

Finally, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

<sup>5</sup> We would expect a district court to accord the Attorney General's conclusions appropriate deference where subsequent litigation implicates some of the same questions considered during the preclearance process. Appropriate deference, however, is not the same thing as collateral estoppel.



appellants would wish (J.S. App. 48a). That might have relevance to a claim that the district court's factual findings were clearly erroneous; it does not present an issue warranting this Court's plenary review.

2. We conclude that appellants' other questions, pertaining to racial bloc voting and minority electoral success, are substantial and that the district court's treatment of these issues warrants plenary review. The legislative background of amended Section 2 underscores the centrality of these legal concepts to the 1982 Voting Rights compromise. Amended Section 2 reflects the consensus of an overwhelming majority of the Congress, reached only after intensive and divisive debate. The language was proposed by Senator Dole as a means of resolving a deadlock in the Senate Judiciary Committee that occurred after the Constitution Subcommittee had rejected the House of Representatives' version of Section 2. As revealed by the legislative history,<sup>6</sup> the compromise encompassed three key areas of consensus.

First, there was widespread agreement that direct evidence of intent to discriminate should not be necessary to establish a violation under Section 2. Proponents of an effects test argued that this Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), insulated discriminatory practices from review because of the difficulty of obtaining evidence regarding the subjective motivations of legislators—especially when the practices in question were adopted long ago. See, e.g., H.R. Rep. 97-227, 97th Cong., 1st Sess. 29 (1981) [hereinafter cited as House Report]; 1 *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the*

<sup>6</sup> In light of the compromise character of the ultimate legislation, undue emphasis must not be accorded the views of any one faction in the controversy. Accordingly, statements of the majority in the Senate Report must be evaluated against statements of additional views and the record established before the body as a whole. The statements and explanations of Senator Dole, the sponsor of the compromise, must be given particular weight, as well as the views of the President, whose support for the compromise ensured its passage.

*Judiciary*, 97th Cong., 2d Sess. 199 (1982) (opening statement by Sen. Mathias) [hereinafter cited as Senate Hearings]; *id.* at 813-819 (testimony of Armand Derfner). And opponents of the effects test agreed, in essence, that a finding of unlawful vote dilution could and should be made on the strength of objective evidence. See, e.g., *id.* at 516 (statement of Sen. Hatch); *id.* at 1409 (testimony of Prof. Irving Younger).

Second, during the course of the debate, a consensus—Senator Dole described it as “a unanimous consensus”—developed against permitting Section 2 claims to be based on the inability of a group to achieve representation in proportion to its population within the jurisdiction. S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982) (Additional Views of Sen. Dole) [hereinafter cited as Senate Report]. See House Report 30; Senate Report 33; 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982) (President's signing statement). The most significant feature of the compromise was to modify and expand the language of the House-passed bill to ensure that “equal opportunity” and not “proportional results” would be the legal test. See Senate Report 193-194 (Additional Views of Sen. Dole); *id.* at 199 (Supplemental Views of Sen. Grassley). This was accomplished in two ways: first, by introducing “additional language delineating what legal standard should apply under the results test”<sup>7</sup> and, second, by “clarifying

<sup>7</sup> One of the principal criticisms levelled against the amended Section 2 as it had passed the House of Representatives was that it contained no “core value”—no “ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it”—other than the repudiated notion of “equal electoral results for defined minority groups, or proportional representation” (Senate Report 137 (Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Judiciary Comm.)). The response of the proponents of the change was to point to the language in *White v. Regester*, 412 U.S. 755, 769 (1973), that “the plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election are not equally open to participation by the group in question.” See 1 Senate Hearings 959 (testimony of Prof. Norman Dorsen). Part of the compromise eventually adopted was to incorporate this language in the statute as the governing legal

that this test is not a mandate for proportional representation." 2 Senate Hearings 60 (statement of Sen. Dole).

Third, both sides in the controversy agreed that the concepts of unconstitutional vote dilution developed by this Court in *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and applied by the lower courts prior to *City of Mobile* should govern Section 2 cases. See House Report 30 & n.104; Senate Report 27-28, 67-68 (majority views); *id.* at 104 n.24, para. 6 (Additional Views of Sen. Hatch); *id.* at 194 (Additional Views of Sen. Dole).

The language and structure of amended Section 2 reflect these areas of consensus. The provision now explicitly establishes both the nature of the evidence to be considered by the district court in resolving a vote dilution claim and the legal standard by which this evidence is to be evaluated. The evidence to be considered is the "totality of the circumstances," by which Congress meant the various so-called "objective factors" identified by

standard. As Senator Dole explained, the "legal standards to be applied under the 'results' test" were delineated "in order to address the proportional representation issue" (Senate Report 194 (Additional Views of Sen. Dole)).

\* The proportional representation disclaimer, as it appeared in the House-passed bill (H.R. 3112, 97th Cong., 1st Sess. § 2 (1981) (emphasis added)), provided:

The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, *in and of itself*, constitute a violation of this section.

Critics of the House bill objected that under this language, a lack of proportional representation, if accompanied by any one of numerous possible "objective factors," could support a finding of a violation. This would render the disclaimer meaningless. See, *e.g.*, Senate Report 142-146 (Subcomm. Report). The compromise amendment, adopted by the full Congress, eliminated the phrase "in and of itself," which the critics had found so troubling. Senate Report 68 n.225. The majority views portion of the Senate Report expressly rejects the interpretation of the disclaimer under which "the lack of proportional representation, \* \* \* plus the addition of one other 'factor,' " would establish a violation (*id.* at 34).

this Court and other courts in constitutional vote dilution claims prior to *City of Mobile*, notably those in *White v. Regester*.

The district court here faithfully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous. The issue in this case is solely whether the district court correctly interpreted the legal standard under which these factors may bear upon the ultimate conclusion that there has been impermissible vote dilution. Appellees are thus mistaken when they characterize this appeal as one challenging findings of fact subject to the clear error standard of Fed. R. Civ. P. 52(a). It appears to be their view that, so long as the district court has ostensibly trudged through each of the factors listed in the Senate Report, and its subsidiary findings on each of those factors are not plainly incorrect, there remains nothing for an appellate court to do. See Mot. to Dis. 21, 35-36. We believe this position is both shortsighted and incorrect—shortsighted because it would disable future plaintiffs from effectively challenging decisions where, on an essentially standardless basis, a district court determines that the "totality of the circumstances" did *not* support their case, and incorrect because it confuses the issue of relevant evidence with the issue of legal standard.

The drafters of the compromise Section 2 were quite specific regarding the legal standard to be applied (see Senate Report 194 (Additional Views of Sen. Dole)); this was thought necessary, in part, because in the absence of an explicit standard the courts might adopt some version of a proportional representation theory. Moreover, states and localities need an intelligible and predictable standard to which they can conform. Appellate court review, at more than a perfunctory level, is needed to hold the district courts accountable to the intention of Congress. In any event, appellate courts both before *City of Mobile* and since the passage of amended Section 2 have engaged in more searching analysis of legal standard than appellees advocate in this case. See,



e.g., *Whitcomb v. Chavis*, *supra*; *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1563 (11th Cir. 1984), appeal dismissed and cert. denied, No. 84-243 (Nov. 5, 1984); *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Nevett v. Sides*, 533 F.2d 1361, 1364-1365 (5th Cir. 1976).

3. As appellants contend (J.S. 7-12 (Question 1); *id.* at 17-21 (Question 3)), the district court's interpretation of amended Section 2 is flawed in two fundamental, and related, respects. First, the court found a violation of Section 2 in the absence of evidence that the "results" of the multimember districts challenged in this case were to deny black voters an equal opportunity to participate in the political process. In light of the significant electoral successes of candidates supported by the black community—in three of the five districts, success as great as or greater than that which would be expected under a single-member districting plan—the only explanation for the district court's conclusion is that it erroneously equated the legal standard of Section 2 with one of *guaranteed* electoral success in proportion to the black percentage of the population. The decision thus conflicts with the legal standard prescribed by Congress (see, e.g., Senate Report 194 (Additional Views of Sen. Dole)), and with this Court's summary affirmances in *Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984), and *Brooks v. Allain*, No. 83-1865 (Nov. 13, 1984).<sup>9</sup>

<sup>9</sup> In *Seamon*, the district court rejected a Section 2 claim that minority voters were entitled to a "'safe' district in which the minority population approaches 65% of the overall population" (slip op. 11-12); under the challenged plan, minority voters, while not guaranteed the ability to elect one of their own to office, were found to "exert a significant impact" and to "play pivotal roles in key elections" in two high minority impact districts (*id.* at 15). Similarly, in *Brooks*, minority voters asked this Court to overturn a court-ordered districting plan creating a district with a "razor-thin 52.8 percent black voting age population" in favor of one in which black candidates would be effectively guaranteed the seat. 83-1865 J.S. at 16. This Court's summary affirmances establish that minority voters do not have a right under Section 2 to the crea-

Second, and more explicitly, the court adopted a definition of racial bloc voting—which it correctly identified as the "linchpin" of a vote dilution case (J.S. App. 15a)—under which racial polarization is deemed to be "substantively significant" or "severe" whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election" (*id.* at 39a-40a). This means, of course, that even a minor degree of racial bloc voting is "substantively significant" or "severe," and that it does not matter whether or not the bloc voting actually "results" in black electoral defeats.<sup>10</sup> This interpretation places the court below in direct conflict with *Terrazas v. Clements*, 581 F. Supp. 1329, 1351-1352 (N.D. Tex. 1984) (three judge court) (test is whether "such bloc voting as may exist" operates so as to "persistently defeat [minority] candidates"); accord, *Seamon v. Upham*, slip. op. 10 n.4. Indeed, under the district court's definition, virtually any electoral district in the country might be deemed to suffer "substantively significant" racial bloc voting. But see 1 Senate Hearings 821 (emphasis added) (testimony of Armand Derfner) ("Section 2, of course, will apply only in those places where there is already an *extraordinary* amount of [racial] division"); Senate Report 33 (in "most communities" minority candidates "receive substantial support from white voters"). In our view, if

tion of "safe" minority-controlled districts—even where other objective factors contribute to the finding of a violation under the "totality of the circumstances."

<sup>10</sup> Appellants' restatement of the district court's standard for racial bloc voting (J.S. 17) is imprecise. Other than in passing (J.S. App. 40a), the district court did not state that polarization exists unless white voters support black candidates in numbers at or exceeding 50%. Rather, the court would find bloc voting whenever the votes of the white population, standing alone, would not be sufficient to elect a black candidate (J.S. App. 39a-40a). Under North Carolina's electoral system, this test could be satisfied by fewer than 50% of the white votes.



white voters are willing to cross racial lines in sufficient numbers that "minority candidates [do] not lose elections solely because of their race" (*Rogers v. Lodge*, 458 U.S. 613, 623 (1982)), then it is largely irrelevant whether the black candidate would have won even if the election "had been held among only the white voters" (J.S. App. 40a).<sup>11</sup>

4. Appellees do not dispute that these are substantial issues. They respond only (Mot. to Dis. 40) that the district court did not "requir[e] guaranteed election," but "followed the statutory mandate by considering black electoral success and failure as one factor in the totality of circumstances leading to its conclusion of discriminatory result."<sup>12</sup> This reading of the opinion is best evaluated by examining the court's treatment of the districts at issue.<sup>13</sup>

Each of the districts is a multimember district; however, it is well established that multimember districts are not inherently unlawful. Senate Report 33; see 2 Senate Hearings 81 (statement of Sen. Dole); *White v. Regester*, 412 U.S. at 765. And while it is true that in each of the districts at issue in this case it would be possible to create one or more single-member districts with effective black voting majorities (see pages 4-6, *supra*), this point cannot be determinative. Minority voters have no right to the creation of safe electoral dis-

<sup>11</sup> Nonetheless, even under the district court's standard, House District 21 and House District 23 should have been upheld; the white voters in those districts supported the black legislators in such numbers that they would have been elected on the strength of the white vote alone, as the district court found (J.S. App. 40a n.31).

<sup>12</sup> If appellees mean to suggest (Mot. to Dis. 15, 21) that electoral results are merely "one circumstance" among many to be considered, in the sense that a Section 2 case could be proven even where minority candidates had achieved significant successes at the polls, we disagree. A finding of adverse electoral "results" is a necessary—though not sufficient—element in the plaintiff's case.

<sup>13</sup> We do not discuss House District 8 or Senate District 2, since appellants' only argument concerning them is based on the supposed collateral estoppel effect of preclearance.

tricts merely because they could feasibly be drawn. *Brooks v. Allain*, *supra*; *Strake v. Seamon*, *supra*; *Whitcomb v. Chavis*, *supra*; *Terrazas v. Clements*, 581 F. Supp. at 1354. Nor can it be presumed that "safe" seats for minority officeholders would necessarily be in the interests of minority voters. See *United States v. Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978). Thus, if the "gravamen" of appellees' claim is simply that North Carolina chose to use multimember districts where "there are sufficient concentrations of black voters to form majority black single-member districts," as the district court stated (J.S. App. 4a), their claim necessarily falls short of establishing a violation.

In three of the districts, black candidates supported by the black community have been elected under the challenged plan in numbers as great as or greater than would be expected under a single-member plan, and black voters have wielded influence over other seats as well. Ever since 1973, the black voters of House District 23, who make up 36.3% of the population and 28.6% of the registered voters, have succeeded in electing one black member of the three-member delegation. See pages 4-5, *supra*. In House District 21, the 21.8% black minority has elected one of the six representatives since 1980, with the support of between 31% and 45% of the white voters in the district. See page 4, *supra*. Indeed, the district court found that the black representative in District 21 would have been elected in 1982 even if the election had been held only among whites (J.S. App. 39a-40a). And in House District 39, where black persons make up 25.1% of the population, a black candidate was elected to the five-member delegation in 1974 and 1976, and two black candidates—40% of the delegation—were elected under the challenged plan in 1982, both with substantial white support. See pages 5-6, *supra*.<sup>14</sup> By contrast, under the

<sup>14</sup> Appellees seek to minimize the significance of this electoral success on the ground (Mot. to Dis. 26-27) that the 1982 election year was "obviously aberrational"—attributing this conclusion

alternative favored by appellees, in each of these districts black voters would be relegated to one single-member district with a large black majority; black voters would effectively lose the opportunity to contest the remaining seats and (more importantly) to exert electoral influence on the other representatives. Judged simply on the basis of "results," the multimember plans in these districts have apparently enhanced—not diluted—minority voting strength.

In the two remaining districts at issue—House District 36 and Senate District 22, both in Mecklenburg County—black candidates have been less successful. Even there, however, the 26.5% black minority in the House district elected one black member to the eight-member delegation in 1982, and a second black candidate (who lost in the general election) received 39% of the white vote in the primary. In the Senate district, although the 24.3% black minority has not been able to elect a black Senator in the 1980s, a black candidate prevailed throughout the period 1975-1980.

The district court never articulated a standard under which "results" such as these could support a conclusion

to the district court. However, the district court's words have been taken out of context. The court's finding (J.S. App. 37a (footnote omitted)) was as follows:

There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.

In a footnote, the court observed that both parties had offered evidence to establish either that the 1982 elections presaged a "breakthrough" or that they were "aberrational." The court stated that its "finding" in text (quoted above) "reflects our weighing of these conflicting inferences" (*id.* at 37a n.27). It is thus inaccurate for appellees to assert that the district court adopted their view that the 1982 election results should be disregarded as "aberrational." At most, it can be said that the court rejected the opposing view—that the 1982 results should be deemed evidence that black

that the multimember electoral system in these districts is "not equally open to participation" by black voters. The court only stated—without reference to actual results in any challenged district—that "the success that has been achieved by black candidates to date" is "too minimal in total numbers and too recent" to support a finding that a black candidate's race is no longer "a significant adverse factor" (J.S. App. 37a-38a).<sup>15</sup> However, the election of representatives in numbers as great as or greater than the approximate black proportion of the population—as in House Districts 21, 23, and 39—is surely not "minimal."<sup>16</sup> And in House District 36 and

candidates would achieve even greater success in the "imminent" future.

Appellees also remark disparagingly that black electoral successes in 1982 occurred "after this lawsuit was filed" (Mot. to Dis. 39); however, the districting plan they challenge was only enacted in 1982. To disregard the results of the 1982 election would be to disregard the only election ever conducted under the challenged plan.

<sup>15</sup> It is particularly troubling that, although the court made factual findings on a district-by-district basis, it drew its ultimate legal inferences regarding racial bloc voting and the effect on minority electoral opportunities on the basis of "the overall results achieved to date at all levels of elective office" (J.S. App. 37a). It is only on such a basis that the court could conclude that black electoral success is "minimal" in a district such as House District 39, where the 25.1% black minority has, with substantial white support, elected 40% of the at-large representatives. To invalidate a specific district on the basis of generalized statewide results at "all levels of elective office" is clear legal error. See *White v. Regester*, 412 U.S. at 769 (requiring an "intensely local appraisal" of the electoral scheme).

<sup>16</sup> Appellees suggest (Mot. to Dis. 27, 41) that the district court's disparagement of the black electoral success in the challenged districts is supported by language in the Senate report. However, the report simply states (Senate Report 29 n.115) that the election of a "few" minority candidates should not be deemed conclusive, since it would enable members of the majority to evade the law by engineering the election of "a 'safe' minority candidate." The record here shows that minority candidates in the challenged



Senate District 22, while the results admittedly fall short of a standard of proportional representation, minority candidates either are or have been successful and plainly are competitive.<sup>17</sup>

Congress could not have expressed more clearly its intention not to invalidate multimember districting plans where minority candidates have had an equal opportunity to be elected—even if they did not necessarily win a proportional share of the seats. See, *e.g.*, Senate Report 33; *id.* at 193 (Additional Views of Sen. Dole).<sup>18</sup> Supporters of amended Section 2 repeatedly assured the Senate Subcommittee that this would not be the result. As Armand

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districts have been elected repeatedly; and there is not the slightest suggestion that they were elected because the majority considered them “safe.”

<sup>17</sup> It is also significant that candidate slating has not been dominated by white voters, that anti-single shot voting or equivalent requirements have not been employed, and that there are no present barriers to minority registration or candidacy. In pre-*City of Mobile* cases in which multimember districts have been invalidated, some or all of these factors were usually present. See, *e.g.*, *White v. Regester*, 412 U.S. at 766-767; *Wallace v. House*, 515 F.2d 619, 623-624 (5th Cir.), vacated on other grounds, 425 U.S. 947 (1975); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-1306 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom.* *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976); cf. *Whitcomb v. Chavis*, *supra*; *Black Voters v. McDonough*, 565 F.2d 1, 6 (1st Cir. 1977); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109, 1112 (5th Cir. 1975).

<sup>18</sup> The district court evidently misapprehends the significance of Congress's rejection of the proportional representation standard. The court dismissed the “proportional representation” disclaimer in Section 2(b) as meaning no more than that the fact that blacks have not been elected in numbers proportional to their percentage of the population “does not *alone* establish that vote dilution has resulted” (J.S. App. 15a & n.13 (emphasis added)). As discussed above (note 8), the disclaimer was expressly drafted to avoid such a narrow interpretation. In effect, the district court has interpreted the Act as imposing a “proportional representation plus” standard rather than an “equal opportunity” standard.

Derfner, head of the Voting Rights Project, explained to the Senate Subcommittee (1 Senate Hearings 803):

the at-large elections that I \* \* \* have been focusing on are those in which the result of those at-large elections is basically to shut out the minority voters. It is not a question of whether they will get more or less or whether the majority voters will get more or less. It is a question of some versus nothing.

See also *id.* at 1209 (testimony of Frank Parker); cf. *Rogers v. Lodge*, 458 U.S. at 616 (emphasis in original) (“multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district”); *Whitcomb v. Chavis*, 403 U.S. at 158-159 (multimember districts challenged for “their winner-take-all aspects”).

The pre-*City of Mobile* decisions of this and other courts bear out that multimember districts are not unlawful where, as here, minority candidates are not effectively shut out of the electoral process. The closest analogy to this case is *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976), in which the court of appeals upheld the validity of an at-large system under which the 40% black minority elected one member to an eight-member city council. Indeed, in many cases prior to *City of Mobile* involving at-large voting systems where the aggregate of factors was unquestionably *less* favorable to minority voters than in this case—most particularly, where no black citizen had ever been elected under the system—challenges to the voting plans were nonetheless held to be insufficient. See, *e.g.*, *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *David v. Garrison*, 553 F.2d 923 (5th Cir. 1977); *McGill v. Gadsen County Comm'n*, 535 F.2d 277 (5th Cir. 1976). It is significant that the Senate majority and other supporters of amended Section 2 pointed especially to these cases in which the defendant jurisdictions prevailed—including *Dove v. Moore*, *supra*—as indications of the way in which the new provision



should be interpreted. Senate Report 33; 1 Senate Hearings 795-796, 797 (testimony of Armand Derfner).

The decision below thus raises serious and substantial questions regarding the interpretation of Section 2(b). Can the central—the “linchpin”—finding of racially polarized voting be sustained in the face of substantial, and decisive, white support for black candidates, merely because a white candidate would have won if the election had been held only among white voters? Is a district court justified in insisting on “safe” single-member seats even where, as its own factual findings unequivocally demonstrate, black voters under a multimember plan have an equal opportunity to participate in the political process and to elect representatives of their choice? The debates in Congress focused in large part on these issues, and the compromise adopted by Congress depended in large part upon the answer. As this decision demonstrates, guidance from the Court is needed to ensure that the congressional intention will be honored in this and future cases.<sup>10</sup>

<sup>10</sup> If the Court were to conclude that the district court erred, without the need for further briefing and argument, the appropriate disposition would be to remand for further proceedings. As to House District 36 and Senate District 22, there may well be a basis in the record, not reflected in the opinion of the district court, for concluding that the relative lack of success of black voters at the polls is attributable to aspects of the electoral system that constitute a denial of equal opportunity for effective participation, in violation of Section 2. It is difficult to imagine any basis, given the factual findings, for invalidating House Districts 21, 23, or 39.

## CONCLUSION

The decision of the district court should be summarily affirmed insofar as it holds that House District 8 and Senate District 2 are unlawful under Section 2 of the Voting Rights Act. This Court should note probable jurisdiction to review the decision of the district court with respect to the remaining districts.

Respectfully submitted.

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APRIL 1985

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CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

LACY H. THORNBURG, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

**SUPPLEMENTAL BRIEF FOR APPELLEES**

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No. 83-1968

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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LACY H. THORNBURG, et al.,

Appellants,

v.

RALPH GINGLES, et al.,

Appellees.

=====

On Appeal from the United States  
District Court for the Eastern  
District of North Carolina

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SUPPLEMENTAL BRIEF FOR APPELLEES

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Appellees submit this Supplemental  
Brief in response to the brief filed by  
the United States.

The controlling question raised by the brief of the United States concerns the standard to be applied by this Court in reviewing appeals which present essentially factual issues. A section 2 action such as this requires the trial court to determine whether

the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group].

The presence or absence of such equal opportunity, like the presence or absence of a discriminatory motive, is a factual question. See Hunter v. Underwood, \_\_\_ U.S. \_\_\_ (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Correctly recognizing the factual nature of that issue, this Court has on two occasions during the

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<sup>1</sup> 42 U.S.C. § 1973(b).

present term summarily affirmed appeals in section 2 actions. Strake v. Seamon, No. 83-1823 (Oct. 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). If an ordinary appeal presenting a disputed question of fact is now to be treated for that reason alone as presenting a "substantial question," then this case, and almost all direct appeals to this Court, will have to be set for full briefing and argument. We urge, however, that to routinely treat appeals regarding such factual disputes as presenting substantial questions would be inconsistent with Rule 52(a), Federal Rules of Civil Procedure, and with the efficient management of this Court's docket.

The Solicitor General, having conducted his own review of some portions of the record,<sup>2</sup> advises the Court that, had he

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<sup>2</sup> The Solicitor General, understandably less

been the trial judge, he would have decided portions of the case differently. The judges who actually tried this case, all of them North Carolinians with long personal understanding of circumstances in that state, concluded that blacks were denied an equal opportunity to participate in the political processes in six North Carolina multi-member and one single member legislative districts. The Solicitor General, on the other hand, is of the opinion that there is a lack of

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familiar with the details of this case than the trial court, makes a number of inaccurate assertions about the record. The government asserts, for example, "there is not the slightest suggestion" that black candidates were elected because whites considered them "safe". (U.S. Br. 18 n. 17). In fact there was uncontradicted testimony that only blacks who were safe could be elected. (Tr. 625-26, 691, 851, 857). The Solicitor also asserts, incorrectly, (U.S. Br. 17 n.14) that the 1982 election was the only election under the plan in question. In fact, the districts have been the same since 1971. (J.S. App. 19a)

equal opportunity in 2 districts,<sup>3</sup> that "there may well be" a lack of opportunity in 2 other districts,<sup>4</sup> but that blacks in fact enjoy equal opportunity to participate in the political process in the three remaining districts.<sup>5</sup> Other Solicitors General might come to still different conclusions with regard to the political and racial realities in various portions of North Carolina.

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<sup>3</sup> House District 8 and Senate District 2; U.S. Brief 21.

<sup>4</sup> House District 36 and Senate District 22; U.S. Brief 20 n.10 The appendix to the jurisdictional statement which contains the District Court's opinion has a typographical error stating erroneously that two black citizens have run "successfully" for the Senate from Mecklenburg County. The correct word is "unsuccessfully". J.S. App. 34a.

<sup>5</sup> House Districts 21, 23 and 39; U.S. Brief 16.



The government's fact-bound and statistic-laden brief, noticeably devoid of any reference to Rule 52, sets out all of the evidence in this case which supported the position of the defendants. It omits, however, any reference to the substantial evidence which was relied on by the trial court in finding discrimination in the political processes in each of the seven districts in controversy.<sup>6</sup> The Senate Report accompanying section 2 listed seven primary factual factors that should be considered in a section 2 case and the government does not challenge the findings in the district court's opinion that at least six of those factors supported appellees' claims. On the contrary, the government candidly acknowledges "[t]he district court here faith-

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<sup>6</sup> J.A. App. 21a-52a.

fully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous." (U.S. Br. 11).

The government apparently contends that all the evidence of discrimination and inequality in the political process was outweighed, at least as to House Districts 21, 23 and 39, solely by the fact that blacks actually won some elections in those multi-member districts. It urges

Judged simply on the basis of 'results,' the multimember plans in these districts have apparently enhanced -- not diluted -- minority strength. (U.S. Br. 16).

On the government's view, the only "result" which a court may consider is the number of blacks who won even the most recent election. Section 2, however, does not authorize a court to "judg[e] simply

on the basis of [election] 'results'", but requires a more penetrating inquiry into all evidence tending to demonstrate the presence or absence of inequality of opportunity in the political process.<sup>7</sup> Congress itself expressly emphasized in section 2 that the rate at which minorities had been elected was only "one circumstance which may be considered."

<sup>7</sup> The district court found, *inter alia*, that the use of racial appeals in elections has been widespread and persists to the present, J.S. App. 32a; the use of a majority vote requirement "exists as a continuing practical impediment to the opportunity of black voting minorities" to elect candidates of their choice, J.S. App. 30a; a substantial gap between black and white voter registration caused by past intentional discrimination; extreme racial polarization in voting patterns; and a black electorate more impoverished and less well educated than the white electorate and, therefore, less able to participate effectively in the more expensive multi-member district elections. There was also substantial, uncontradicted evidence that racial appeals were used in the 1982 Durham County congressional race and the then nascent 1984 election for U.S. Senate.

(Emphasis added). The legislative history of section 2 repeatedly makes clear that Congress intended that the courts were not to attach conclusive significance to the fact that some minorities had won elections under a challenged plan.<sup>8</sup>

The circumstances of this case illustrate the wisdom of Congress' decision to require courts to consider a wide range of circumstances in assessing whether blacks are afforded equal opportunity to participate in the political process. A number

<sup>8</sup> S. Rep. 97-417, 29 n.115 ("the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section"), n. 118. ("The failure of plaintiff to establish any particular factor is not rebuttal evidence of non-dilution"). See also S. Rep. at 2, 16, 21, 22, 27, 29, 33 and 34-35. The floor debates are replete with similar references. In addition, see *White v. Regester*, 412 U.S. 755 (1973) affirming *Graves v. Barnes*, 343 F. Supp. 704, 726, 732 (W.D. Texas 1972) (dilution present although record shows repeated election of minority candidates).



of the instances in which blacks had won elections occurred only after the commencement of this litigation, a circumstance which the trial court believed tainted their significance.<sup>9</sup> In several other elections the successful black candidates were unopposed.<sup>10</sup> In one example relied on by the Solicitor in which a black was elected in 1982, every one of the 11 black candidates for at-large elections in that county in the previous four years had been defeated.<sup>11</sup> In assessing the political opportunities afforded to black

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The Solicitor General seeks, in the alternative, to portray his disagreement with the trial court's factual findings as involving some dispute of law. This he does by the simple expedient of accusing the district court of either dissembling or not knowing what it was doing. (U.S. Brief 12) Thus, despite the district court's repeated statements that section 2 requires only an equal opportunity to participate in the political process,<sup>12</sup> the Solicitor General insists that "the only

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explanation for the district court's conclusion is that it erroneously equated the legal standard of Section 2 with one of guaranteed electoral success in proportion to the black percentage of the population." (U.S. Brief 12, emphasis original). Elsewhere, the Solicitor, although unable to cite any such holding by the trial court, asserts that the court must have been applying an unstated "proportional representation plus" standard. (U.S. Brief 18 n.18). The actual text of the district court opinion simply does not contain any of the legal holdings to which the Solicitor indicates he would object if they were some day contained in some other decision.

The government does not assert that the trial court's factual finding of racially polarized voting was erroneous, or discuss the extensive evidence on which

that finding was based. Rather, the government asserts that the trial court, although apparently justified in finding racially polarized voting on the record in this case, adopted an erroneous "definition" of racial bloc voting. (U.S. Br. 13). Nothing in the trial court's detailed analysis of racial voting patterns, however, purports to set any mechanical standard regarding what degree and frequency of racial polarization is necessary to support a section 2 claim. Nothing in that opinion supports the government's assertion that the trial court would have found racial polarization whenever less than 50% of white voters voted for a black candidate. In this case, over the course of some 53 elections, an average of over 81% of white voters refused to support any black candidate. (J.S. App. 40a). Prior to this

litigation there were almost no elections in which a black candidate got votes from as many as one-third of the white voters. (J.S. App. 41a-46a). In the five elections where a black candidate was unopposed, a majority of whites were so determined not to support a black that they voted for no one rather than vote for the black candidate. (J.S. App. 44a). While the level of white resistance to black candidates was in other instances less extreme, the trial court was certainly justified in concluding that there was racial polarization, and the Solicitor General does not assert otherwise.

The Solicitor General urges this Court to note probable jurisdiction so that, laying aside the policy of appellate self-restraint announced in Pullman-Standard v. Swint, 456 U.S. 273 (1981), and its progeny, the Court can embark upon

its own inquiry into the diverse nuances of racial politics in Cabarrus, Forsyth, Wake, Wilson, Edgecombe, Nash, Durham, and Mecklenburg counties. Twice within the last month, however, this Court has emphatically admonished the courts of appeals against such undertakings. Anderson v. City of Bessemer City, \_\_\_ U.S. \_\_\_ (1985); Witt v. Wainwright, \_\_\_ U.S. \_\_\_ (1985). Twice in the present term this Court has summarily affirmed similar fact-bound appeals from district court decisions rejecting section 2 claims. Starke v. Seamon, No. 83-1823 (October 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). No different standard of review should be applied here merely because in this section 2 case the prevailing party happened to be the plaintiffs.

Appellees in this case did not seek, and the trial court did not require, any guarantee of proportional representation. Nor did proportional representation result from that court's order. Prior to this litigation only 4 of the 170 members of the North Carolina legislature were black; today there are still only 16 black members, less than 10%, a far smaller proportion than the 22.4% of the population who are black. Whites, who are 75.8% of the state population, still hold more than 90% of the seats in the legislature.

In the past this Court has frequently deferred to the views of the Attorney General with regard to the interpretation of section 5 of the Voting Rights Act. No such deference is warranted with respect to section 2. Although the Department of Justice in 1965 drafted and strongly supported enactment of section 5, the

Department in 1981 and 1982 led the opposition to the amendment of section 2, acquiescing in the adoption of that provision only after congressional approval was unavoidable. The Attorney General, although directly responsible for the administration of section 5, has no similar role in the enforcement of section 2. Where, as where, a voting rights claim turns primarily on a factual dispute, the decisions of this Court require that deference be paid to the judge or judges who heard the case, not to a Justice Department official, however well intentioned, who may have read some portion of the record. White v. Regester, 412 U.S. 755, 769 (1973). The views of the Department are entitled to even less weight when, as in this case, the Solicitor's present claim that at-large districts "enhance" the interests of minority



voters in North Carolina represents a complete reversal of the 1981 position of the Civil Rights Division that such districts in North Carolina "necessarily submerge[] cognizable minority population concentrations into larger white electorates." (Section 5 objection letter, Nov. 30, 1981, J.S. App. 6a).

CONCLUSION

For the above reason, the judgment of the district court should be summarily affirmed.

Respectfully submitted,

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No. 83-1968

APR 22 1985

ALEXANDER L. STEVAS  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

LACY H. THORNBURG, *et al.*,*Appellants,*

v.

RALPH GINGLES, *et al.*,*Appellees.*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**SUPPLEMENTAL BRIEF FOR APPELLEES**

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On Appeal from the United States  
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SUPPLEMENTAL BRIEF FOR APPELLEES

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Appellees submit this Supplemental  
Brief in response to the brief filed by  
the United States.

The controlling question raised by the brief of the United States concerns the standard to be applied by this Court in reviewing appeals which present essentially factual issues. A section 2 action such as this requires the trial court to determine whether

the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group].

The presence or absence of such equal opportunity, like the presence or absence of a discriminatory motive, is a factual question. See Hunter v. Underwood, \_\_\_ U.S. \_\_\_ (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Correctly recognizing the factual nature of that issue, this Court has on two occasions during the

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<sup>1</sup> 42 U.S.C. § 1973(b).

present term summarily affirmed appeals in section 2 actions. Strake v. Seamon, No. 83-1823 (Oct. 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). If an ordinary appeal presenting a disputed question of fact is now to be treated for that reason alone as presenting a "substantial question," then this case, and almost all direct appeals to this Court, will have to be set for full briefing and argument. We urge, however, that to routinely treat appeals regarding such factual disputes as presenting substantial questions would be inconsistent with Rule 52(a), Federal Rules of Civil Procedure, and with the efficient management of this Court's docket.

The Solicitor General, having conducted his own review of some portions of the record,<sup>2</sup> advises the Court that, had he

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<sup>2</sup> The Solicitor General, understandably less

been the trial judge, he would have decided portions of the case differently. The judges who actually tried this case, all of them North Carolinians with long personal understanding of circumstances in that state, concluded that blacks were denied an equal opportunity to participate in the political processes in six North Carolina multi-member and one single member legislative districts. The Solicitor General, on the other hand, is of the opinion that there is a lack of

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familiar with the details of this case than the trial court, makes a number of inaccurate assertions about the record. The government asserts, for example, "there is not the slightest suggestion" that black candidates were elected because whites considered them "safe". (U.S. Br. 18 n. 17). In fact there was uncontradicted testimony that only blacks who were safe could be elected. (Tr. 625-26, 691, 851, 857). The Solicitor also asserts, incorrectly, (U.S. Br. 17 n.14) that the 1982 election was the only election under the plan in question. In fact, the districts have been the same since 1971. (J.S. App. 19a)

equal opportunity in 2 districts,<sup>3</sup> that "there may well be" a lack of opportunity in 2 other districts,<sup>4</sup> but that blacks in fact enjoy equal opportunity to participate in the political process in the three remaining districts.<sup>5</sup> Other Solicitors General might come to still different conclusions with regard to the political and racial realities in various portions of North Carolina.

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<sup>3</sup> House District 8 and Senate District 2; U.S. Brief 21.

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fully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous." (U.S. Br. 11).

The government apparently contends that all the evidence of discrimination and inequality in the political process was outweighed, at least as to House Districts 21, 23 and 39, solely by the fact that blacks actually won some elections in those multi-member districts. It urges

Judged simply on the basis of 'results,' the multimember plans in these districts have apparently enhanced -- not diluted -- minority strength. (U.S. Br. 16).

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Department in 1981 and 1982 led the opposition to the amendment of section 2, acquiescing in the adoption of that provision only after congressional approval was unavoidable. The Attorney General, although directly responsible for the administration of section 5, has no similar role in the enforcement of section 2. Where, as where, a voting rights claim turns primarily on a factual dispute, the decisions of this Court require that deference be paid to the judge or judges who heard the case, not to a Justice Department official, however well intentioned, who may have read some portion of the record. White v. Regester, 412 U.S. 755, 769 (1973). The views of the Department are entitled to even less weight when, as in this case, the Solicitor's present claim that at-large districts "enhance" the interests of minority



voters in North Carolina represents a complete reversal of the 1981 position of the Civil Rights Division that such districts in North Carolina "necessarily submerge[] cognizable minority population concentrations into larger white electorates." (Section 5 objection letter, Nov. 30, 1981, J.S. App. 6a).

CONCLUSION

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Respectfully submitted,

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During the early months of 1982, counsel for the General Assembly worked closely with the Civil Rights Division of the Department of Justice in order to remedy those aspects of the plans found objectionable under Section 5. In February, the General Assembly enacted new redistricting plans in which some county lines were broken in order to overcome the Attorney General's objection in the covered counties of the State. When these plans were submitted, the Attorney General found one problematic district in each plan. These subsequently were redrawn to Justice Department specifications. On April 30, 1982, the Senate and House plans received Section 5 preclearance.

#### **The Plaintiffs' Claim**

The action below remained pending during the course of these legislative proceedings, and several amendments to the complaint were permitted to accommodate the successive revisions of the redistricting plans. The last supplemental complaint included, as a basis of the plaintiffs' claim of vote dilution, Section 2 of the Voting Rights Act, as amended on June 29, 1982. In its final form, the complaint alleged that in 6 General Assembly districts, the use of multi-member configurations diluted the voting strength of black citizens in violation of Amended Section 2. In addition, the plaintiffs alleged that a concentration of black voters was split between 2 single-member Senate districts resulting in vote dilution. The class was certified as the class of all black residents of the State,<sup>3</sup> and

<sup>3</sup> Although the plaintiffs were certified as the class of all black voters in the state, their position was hardly one based on consensus. Four prominent black leaders testified for the State that

trial to a three-judge court was held for 8 days commencing July 25, 1983.

The plaintiffs attempted to prove that five multi-member House districts and 1 multi-member Senate district violated Section 2. These districts were:

House District No. 23—Durham County

House District No. 36—Mecklenburg County

Senate District No. 22—Mecklenburg and  
Cabarrus Counties

House District No. 39—Forsyth County

House District No. 21—Wake County

House District No. 8—Nash, Wilson, and  
Edgecombe Counties

---

blacks in the at-large districts had equal access to the process and three of them specifically stated that single-member legislative districts would hinder rather than help blacks politically. It became clear during the trial that much of the impetus for the challenge to the multi-member districting came from plaintiffs' counsel. Neither the Chairman of the House nor the Senate Reapportionment Committee had ever been contacted by the plaintiffs during the legislative process regarding the desire for single-member districts. R. 1065-66, 1975.

The extent of the artifice constructed by the plaintiffs is demonstrated by the following vignette. Two days before trial, the Mecklenburg Black Caucus passed a resolution supporting single-member districts. R. 1477-78. The resolution was handwritten by a partner in the firm representing the plaintiffs and delivered by him to the Caucus Chairman during the Caucus meeting. R. 1489. The issue was not on the agenda for the meeting and the members had no notice of the vote. R. 1484. The plaintiffs then called the Chairman of the Caucus as a witness at trial to introduce the resolution to support their contention that the black community was in agreement on the issue of single-member districts.



The plaintiffs also tried to show that Senate district 2, a single-member district was statutorily infirm because the district could have been drawn to create a 59% black majority. As drawn by the legislature and approved by the Attorney General, the district's population was 55.1% black.<sup>4</sup>

**Political Participation and Electoral Success  
of Blacks in the Challenged Districts**

The record reflects the following facts:

Durham County comprised a 3-member House district which had a black voting age population of 33.6%. Stip. 59.<sup>5</sup> Durham has had at least one black representative to the House continuously since 1973. Stip. 148. At the time of trial two of its five county commissioners, one of whom is Chairman, were black (Stip. 150), as were two of its four elected district court judges.<sup>6</sup> Stip. 153. The three-member Durham County Board of Elections had a black member from 1970 until 1981, when he was appointed to the State Board of Elections. Stip. 154. The chairmanship of the Durham County Democratic Party was held by a black from 1969 through 1979 and is held by a black for the 1983-85 term. Stip. 155. One single-member

<sup>4</sup> In order to draw a black majority Senate district in the Northeast portion of the State, as the U.S. Attorney General had instructed, it was necessary to divide many counties. The resulting Senate District 2 contains portions of Bertie, Chowan, Gates, Halifax, Northampton, Hertford, Martin and Washington Counties.

<sup>5</sup> The Stipulations of fact are contained in the Pre-trial Order. Citations are to the number assigned to the Stipulation.

<sup>6</sup> The facts here recited are from the record and so naturally reflect the electoral situation in 1983 at the time of trial.

House district with a black population of approximately 70% could be drawn within Durham County. Stip. 144.

In addition, the evidence shows that the Durham Committee on the Affairs of Black People is a powerful political organization which endorses and supports both black and white candidates for election. No candidate in Durham can expect to get many black votes without the endorsement of the Durham Committee. R. 1295.

The black voting age population of Mecklenburg is 24%. Stip. 59. One of the eight House members elected from Mecklenburg County in 1982 is black. Stip. 116. James D. Richardson, who is also black and was running in his first election for public office in 1982, came in ninth in a race for eight seats, with only 250 votes less than the eighth successful candidate. Stip. 116. This was in a field of 18 candidates. Pl.Ex. 14(d), R. 86, 112.<sup>7</sup> While there is currently no black senator from the Mecklenburg-Cabarrus County Senate District, James Polk, a first time candidate for public office, ran fifth in a race for four seats in the 1982 election. Stip. 118. The Mecklenburg-Cabarrus County Senate District did have a black senator for three terms from 1975 through 1980, until his death before the 1980 elections. Stip. 117. In addition, it was stipulated at the time of trial that one of the five Mecklenburg County Commissioners, Stip. 119, two of the nine Charlotte-Mecklenburg Board of Education members, Stip. 123, and one of the ten Mecklenburg County District Court judges, Stip. 122, all of whom are black,

<sup>7</sup> Plaintiffs' Exhibits will be identified as Pl.Ex.; Defendants' Exhibits as Def.Ex.

were elected at-large. In addition, another black was appointed to a vacant district court judgeship in Mecklenburg County. Stip. 123.

At the time of trial a black served as the chairperson of the three member Mecklenburg County Board of Elections. Stip. 125. The Mecklenburg Board of Elections also had one black member in the years 1970 to 1974 and 1977 to the present. Stip. 125. The chair of the Mecklenburg County Democratic Executive committee at the time of trial and his immediate predecessor are also black. Stip. 126.

The City of Charlotte, located in Mecklenburg County, has a population which is 31% black. Stip. 127. Harvey Gantt, who is black, currently serves as Mayor of that city. J.S. 35a. Charlotte also has two black city council members elected from majority black districts. Stip. 128.

It was stipulated at the time of trial that if Mecklenburg County were subdivided, two single-member House districts each with a black population of 65% could be constructed. Stip. 110. If the Mecklenburg-Cabarrus Senate district were dismantled, one single member Senate district with a black population of 65% could be drawn. Stip. 112.

The five-member House District 39, including most of Forsyth County, has a 22% black voting age population. Stip. 54. Two black representatives were elected in the 1982 elections. Stip. 132. Forsyth County has previously elected a black representative for the 1975-76 and 1977-78 General Assemblies. Stip. 133. Blacks have also been appointed by the Governor on two occasions to represent Forsyth County in the North Carolina House. This occurred in 1977 when a black representative resigned, Stip. 134, and again in 1979

when a white representative resigned. Stip. 135. At the time of trial one of the five Forsyth County Commissioners, Stip. 136, and one of the eight Forsyth County School Board members were black. Stip. 139. Both the County Commission and the School Board are elected at-large. In addition, when the case went to trial the three-member Forsyth County Board of Elections had one black member, and that Board has had one black member every year since 1973. Stip. 141.

The City of Winston-Salem, located in Forsyth County, has a black population of slightly more than 40% and a black voter registration of slightly less than 32%. Stip. 142. The Winston-Salem City Council has eight members elected from wards. Stip. 143. At the time of trial, there were three black members elected from majority black wards and one black member elected from a ward with slightly less than 39% black voter registration. Stip. 143. This black councilman, Larry Womble, defeated a white Democratic incumbent in the primary and a white Republican in the general election in 1981. Stip. 143.

If Forsyth County were divided into single member House districts, one district with a population over 65% black could be formed. Stip. 129.

The current Wake County six member House delegation includes one black member, Dan Blue, who, at the time of trial, was serving his second term. Stip. 162. In the 1982 election, Blue received the highest vote total of the 15 Democrats running in the primary, Stip. 162, and the second highest vote total of the 17 candidates running for the six seats in the general election. Stip. 162. Slightly more than 20% of Wake County's voting age population is black. Stip. 59.



Although no single-member black Senate district can be constructed in Wake County, Stip. 160, Wake elected a black Senator for the 1975-76 and 1977-78 terms. Stip. 163.

In July of 1983, one of the seven Wake County Commissioners was black, Stip. 164, as were two of the eight Wake County District Court Judges. Stip. 165. The Sheriff of Wake County, John Baker, is black and at the time of trial was serving his second term. Stip. 166. In the 1982 election for his second term, Baker received 63.5% of the votes in the general election over a white opponent. Stip. 166. In the Democratic Primary, Baker received over 63% of the vote, defeating two white opponents. Stip. 166. Wake County Commissioners, District Court Judges, and the Sheriff are all elected at large. Stip. 165, 166. Wake County has also had a black member continuously on its three-member Board of Elections since 1970, Stip. 169, and at the time of trial had a black chairman. Stip. 169.

The City of Raleigh in Wake County is 27.4% black. Stip. 171. Raleigh had a black mayor from 1973 to 1975, Stip. 172, and has had one black on its seven-member city council since 1973. Stip. 173.

Although it is not possible to draw a black majority single-member Senate district which is wholly within or includes substantial parts of Wake County, Stip. 161, John W. Winters, who is black, was elected Senator from Wake County for two terms, 1975 through 1978. Stip. 163.

If Wake County were subdivided into single-member House districts, one district with a population around 65% black could be created. Stip. 158.

House District 8 is comprised of three whole counties: Nash, Wilson and Edgecombe, all of which are covered by Section 5 of the Voting Rights Act. Stip. 174. The Attorney General approved this four-member at-large district. Stip. 45. Edgecombe County, which has a voting age population which is 46.7% black, Stip. 59, has a five-member Board of Commissioners elected at-large and when the case went to trial, two of its members were black. Stip. 176.

Senate district 2, a single-member district, is 55.1% black. Stip. 190. This district which lies in an area covered by Section 5, Stip. 190, was drawn according to Justice Department instructions to create a district having a population that was 55% black, regardless of how many county lines had to be crossed. Stip. 190. Consequently, Senate district 2, as it was approved by the Attorney General, Stip. 45, encompasses parts of Bertie, Chowan, Halifax, Hertford, Martin, Northhampton and Washington Counties. In the 2 election years before trial, black candidates had won 3 seats in the State House from areas within the borders of Senate district 2. In Gates County where 49% of the registered voters are black, a black is currently serving a term as Clerk of Court. Stip. 192. In Halifax, several blacks have been elected to the County Commission and the City Council of Roanoke Rapids. It is possible to draw a black district in the general area of Senate district 2 which is 59.4% black. Stip. 188.

The plaintiffs' own witnesses were convincing evidence of the openness of the political process in North Carolina. Their witnesses included Phyllis Lynch, the Chairperson of the Mecklenburg Board of Elections and a force in the County Black Caucus. R. 427. Sam



Reid, as the head of the Vote Task Force in Mecklenburg County, is a special Registration Commissioner appointed by the Mecklenburg County Board of Elections to respond to special requests to register citizens at civic, community and church gatherings. R. 470. Frank Ballance, the representative to the General Assembly from House District 7, is also Chairman of the Second Congressional District Black Caucus. R. 592. Larry Little is an alderman in the City of Winston-Salem. He is also Chairman of the City's Public Works Commission. R. 592. Willie Lovett, Chairman of the Durham Committee on the Affairs of Black People, R. 646, testified that the "impact and responsiveness in the community to the Durham Committee and its recommendations and programs is rather massive." R. 670. G. K. Butterfield, an attorney, organized the Wilson Committee on the Affairs of Black People and is also a gubernatorial appointee to the State Inmates Grievance Board. R. 695, 719, 936. Fred Belfield is President of the Nash County N.A.A.C.P. R. 737, 754. All of these plaintiffs' witnesses are black.

#### Voter Registration

In October of 1982, the State Board of Elections reported the following voter registration statistics for the challenged counties: Stip. 58.

	% White VAP* Registered	% Black VAP Registered
Durham	66.0	52.9
Forsyth	69.4	64.1
Mecklenburg	73.0	50.8

\* Voting Age Population

	% White VAP* Registered	% Black VAP Registered
Wake	72.2	49.7
Nash	64.2	43.0
Wilson	64.2	48.0
Edgecombe	62.7	53.1
Bertie	76.6	60.0
Chowan	74.1	54.0
Gates	83.6	82.3
Halifax	67.3	55.3
Hartford	68.7	58.3
Martin	71.2	53.3
Northhampton	82.1	73.9
Washington	75.6	67.4

\* Voting Age Population

Although black registration still lags behind white registration, the larger gains over the past several years have been among the black population. Def.Ex. 14, R. 505, 510. In the period 1980 to 1982, statewide registration among whites dropped by 112,000, while among blacks it increased by 12,096—as much as 50% in some counties. R. 585. This increase was largely due to an effort launched by the State Board of Elections in 1980 to increase voter registration in general, and in particular among groups traditionally underregistered. Since the publication of these registration figures, the General Assembly has passed legislation to further facilitate voter registration. R. 1335. Now public libraries offer voter registration during library hours. R. 1335-36. In addition, many public high schools now have a permanent voting registrar. R. 1335-36. The legislation further provides that branches of the Department of Motor Vehicles

offer voter registration so that the opportunity to register is available to everyone who comes in to renew or replace a driver's license or to conduct any other business. R. 1336.

Despite the great strides made by the State in eliminating any lingering effects of past electoral discrimination by facilitating and encouraging registration, and despite the considerable electoral success achieved by blacks in North Carolina, the district court found that the challenged districts violated Section 2. The court reached this untenable conclusion because it never uncovered the core value, the specific right, protected by the statute. Section 2 guarantees equal opportunity to participate in the political process. The court below, however, struck down the challenged districts because they did not guarantee electoral success.<sup>8</sup>

#### SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act as amended by Congress in 1982 guarantees equal access to the political process. The focus of the provision is opportunity, not guaranteed results. Congress incorporated the analysis and specific language of *White v. Regester*, 412 U.S. 755 (1973) into the amended statute. Thus a violation of Section 2 is established when plaintiffs demonstrate that the political processes lead-

<sup>8</sup> Apparently the court adopted this conclusion of the plaintiffs' expert, Bernard Grofmann:

My fifth general conclusion is as follows: Even though a constituency has elected a black candidate in the past, this does not provide a guarantee that it will do so in the future, especially if the black incumbent who is the present occupant of that position does not run in the future in subsequent races.

ing to nomination and election are not equally open to participation by the racial minority group.

The record below shows that blacks in North Carolina enjoy active and meaningful participation in politics. This is evidenced by the fact that out of 11 black candidates who ran for election to the General Assembly in 1982, from the districts challenged by the plaintiffs, 7 were elected.

The district court erred in equating access with guaranteed electoral success. This runs counter to the legislative history of Section 2, and the judicial precedents which Congress explicitly invoked.

The district court found that racial bloc voting exists whenever less than 50 percent of the whites vote for a black candidate. This is an arbitrary definition which has no relationship to real politics or electoral outcomes. By virtue of this definition the court found "severe" racial polarization in elections in which the black candidate received 40% of the white vote *and* won the election. Racial bloc voting has legal significance only when it operates to prevent black candidates from being elected to office.

#### ARGUMENT

##### Introduction

On June 29, 1982 Congress enacted amendments to the Voting Rights Act of 1965. Foremost among the changes adopted was a complete transformation of Section 2. Prior to this 1982 amendment, Section 2 had been viewed as simply the statutory restatement of the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55 (1981). Consistent with this Court's rulings in such cases as *Washington v. Davis*,



426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), it was necessary to prove both disparate impact and discriminatory intent in order to establish a violation of the Fifteenth Amendment and consequently, of Section 2. This was the holding of the plurality of the Court in *City of Mobile, supra*.

Congress amended Section 2 to eliminate the intent standard imposed by *Mobile*. Section 2(a) as amended provides that no voting law shall be imposed or applied in a manner which *results* in a denial or abridgement of the right to vote on account of color. Subsection (b) in its entirety reads:

- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973.

The language of Section 2 is clear—the statute is intended to afford to minority citizens the opportunity to meaningfully participate in the political process. It explicitly disavows any guarantee of electoral success or proportional representation.

The legislative history supports a reading of Section 2 which focuses on equal access. On October 15, 1981, the House of Representatives passed H.R. 3112 which transformed Section 2 into a results test. The House version read as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in Section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The Senate Judiciary Subcommittee on the Constitution rejected the proposed amendment and recommended the retention of the existing statutory language. Report of the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., Report on S. 1992. Although many members of the Senate Judiciary Committee supported the House language, there were not enough votes to report the House version to the floor. 128 Cong. Rec. S. 6920 (daily ed. June 17, 1982) (statement of Sen. Hatch). Senator Dole avoided a stalemate by constructing a compromise that allowed a majority of the Judiciary Committee to agree upon a bill. 128 Cong. Rec. S. 6964 (daily ed. June 17, 1982) (statement of Sen. Kennedy).

The Dole compromise, the bill ultimately adopted by Congress, incorporates language from the land-



mark vote dilution case, *White v. Regester*, 412 U.S. 755 (1973). In *White* the Court wrote:

The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question:— that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. 412 U.S. at 766.

Senator Dole made it clear that, just as in *White v. Regester*, the touchstone of the new Section 2 would be equal access and opportunity. S. Rep. No. 417, 97th Cong., 2d Sess. at 193. [hereinafter S. Rep.] On the floor of the Senate, in answer to Senator Thurmond's question as to whether the focus of the amended statute would be on election results or equal access to the process, Senator Dole responded, "[t]he focus of Section 2 is on equal access, as it should be." 128 Cong. Rec. S. 6962 (daily ed. June 17, 1982) (statement of Sen. Dole). He also explained in his views included in the Senate Report that, "[c]itizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." S. Rep. at 193.

The Senate Report echoes the view of Senator Dole that the amendment was intended to codify the equal access standard of *White v. Regester*, S. Rep. at 22-24. Indeed the Senate Report explicitly states that the substitute amendment "codifies the holding in *White*, thus making clear the legislative intent to incorporate that precedent and the extensive case law which developed around it into the application of Section 2." S. Rep. at 32.

The district court erred in failing to apply Section 2 in a manner consistent with the judicial precedents expressly identified by Congress. Although the court acknowledged Congress' reliance on *White v. Regester*, it did not seriously attempt to integrate the language of Section 2 with the case law which Congress sought to codify. Inasmuch as the language of subsection (b) came directly from this Court's opinion in *White*, it is obvious that the statute must be construed in light of this precedent. Because the district court attempted to interpret the amended provision without this essential judicial background, it reached several erroneous conclusions of law. The court's fundamental misconception was that Section 2 creates an affirmative entitlement to proportional representation. Building on this foundation, the court was able to make a finding of vote dilution even though it was evident that black residents of the challenged districts had the same opportunity as whites to participate in the political process and to elect candidates of their choice.

**I. Section 2 of the Voting Rights Act does not entitle protected minorities, in a jurisdiction in which minorities actively participate in the political process and in which minority candidates win elections, to safe electoral districts simply because a minority concentration exists sufficient to create such a district.**

The district court erred in equating a violation of Section 2 with the absence of guaranteed proportional representation. The Court flatly stated:

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns with a chal-

lenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior. (citation omitted). J.S. at 14a.

This statement epitomizes the district court's reading of the amended statute. Although blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them*, (i.e., in proportion to their presence in the population) the court found that Section 2 had been violated. All of the vote dilution cases following *White* run counter to this interpretation. In *David v. Garrison*, for example, the Fifth Circuit wrote that "dilution occurs when the minority voters have no real opportunity to participate in the political process." 553 F.2d 923, 927 (5th Cir. 1977). And in *Dove v. Moore*, the Eighth Circuit in discussing vote dilution under the pre-Mobile constitutional standard now codified in Section 2, stated that the "constitutional touchstone is whether the system is open to full minority participation not whether proportional representation is in fact, achieved." 539 F.2d 1152, 1154 (8th Cir. 1976).

Moreover, the court's understanding of vote dilution runs contrary to specific instruction in the legislative history. The Senate Report explained that some opponents of the results test had suggested that it would enable a plaintiff to win a vote dilution suit by showing an at-large election scheme, underrepresentation of minorities, and a mere scintilla of other evidence.

This is essentially the same standard enunciated by the district court, and the Senate Report states that "this position is simply wrong." S. Rep. at 33.

In addition, the court failed to understand the disclaimer at the end of subsection (b). The statute states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. The district court interpreted this to mean only that lack of proportional representation in and of itself does not constitute a violation of Section 2. J.S. at 15a, n.13. Once again, the Senate Report specifically disavows the interpretation adopted by the court. The Report states that the House version simply assured that a failure to achieve proportional representation in and of itself would not constitute a violation. S. Rep. at n.225. The Senate strengthened the House language to make it explicit that the amended section creates no affirmative right to proportional representation. S. Rep. at 68.

Subsection (b) of the amended statute states that a finding of discriminatory results should be based on the totality of circumstances. The Senate Report elaborates on this by supplying a list of factors which the Committee suggested might be indicative of vote dilution. S. Rep. at 28.<sup>9</sup> These factors were culled from

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<sup>9</sup> The Senate Report criteria are as follows:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

footnote continued on next page



the analytical framework in *White* and also from *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1974), a Fifth Circuit case which followed and applied *White*.

The proper application of the analysis suggested by the Senate Report, and the purpose of Section 2 generally, are best examined in light of *White* and *City of Mobile v. Bolden*, 446 U.S. 55 (1981). The facts of *Mobile*, the case to which Congress adversely reacted, and those of *White*, which set the standard that Congress wished to codify, provide the background necessary to apply the amended statute. Com-

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3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

parisons of the record in this case with the findings of the district courts in *White* and *Mobile* make it clear that Section 2 was never intended to reach the circumstances of the case at bar.

In *White v. Regester* the Court upheld the district court's order to dismantle multimember districts in Dallas and Bexar Counties in Texas. While the *White* Court recognized that multimember districts might be used invidiously to minimize the electoral strength of racial minorities, it also stressed that to sustain such a claim "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." 412 U.S. at 766.

The record in *White* however, showed that the counties in which the Plaintiffs challenged the at-large system had the following characteristics: 1) a history of official racial discrimination, which continued to touch the right of blacks to register, vote and to participate; 2) a majority vote requirement in party primaries; 3) a place rule which reduced multimember elections to a head-to-head contest for each position; 4) only 2 blacks elected to the Texas legislature since Reconstruction; 5) a slating system which excluded minorities; 6) a white dominated organization which controlled the Democratic party and which did not need or solicit black support; 7) a consistent use of racial campaign appeals by the Democratic party. The district court concluded and the Supreme Court agreed that the net result of these factors was to shut racial minorities out of the electoral process.

Likewise in *Mobile*, the plaintiffs attacked the at-large method of electing the city commissioners, 428



F.Supp. 384 (S.D. Ala. 1977). The district court, applying the test used in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), found that the electoral system there was marked by a majority vote requirement in both the primary and general elections, numbered posts, and no residency requirement. In addition, in a city whose population was 35.4% black, no black person had ever been elected to the Board of Commissioners because of acute racial polarization in voting. The Court found further that the city officials had made no effort to bring blacks into the mainstream of the social and cultural life by appointing them to city boards and committees in anything more than token numbers. The plaintiffs also marshalled evidence of police brutality towards blacks, mock lynchings and failure of elected officials to take action in matters of vital concern to black people. On appeal to the Fifth Circuit, the Court noted that the plaintiffs had prevailed on each and every *Zimmer* factor, 571 F.2d 238, 244 (5th Cir. 1978).

The record in the present case differs dramatically from the pictures drawn in *White* and *Mobile*. Multi-member districts in North Carolina simply do not operate to exclude blacks from the political process as they did in those cases. The degree of success at the polls enjoyed by black North Carolinians is sufficient in itself to distinguish this case from *White* and *Mobile* and to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process.

The court below reviewed the evidence by discussing essentially the same factors considered in *White* and *Mobile*. Contrary to the court's conclusion, how-

ever, no matter how one weighs and weighs the evidence presented, it does not add up to denial of equal access to the political forum.

**A. History of official discrimination which touched the right to vote.**

The plaintiffs introduced evidence, not refuted by the State, that North Carolina had in the past prevented blacks from actively participating in the democratic process. Stips. '85-94; R. 224-324. This evidence, however, is relevant only if these past impediments to political participation have a perceptible impact on the ability of blacks to involve themselves effectively in the democratic processes of North Carolina today. See *Major v. Treen*, 574 F.Supp. 325, 65 (E.D. La. 1983). In *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977) the court warned that because no area in the South was free of past discrimination in voting, the *present* effects of such discrimination must be carefully assessed. "The factual question is," the court wrote, "whether that discrimination precludes effective participation in the electoral system by blacks *today* in such a way that it can be remedied by a change in the electoral system." 559 F.2d at 1270. (emphasis added).

The record in this case shows that the drive to engage blacks in the electoral process in North Carolina began before the passage of the Voting Rights Act in 1965. R. 1178-79, 1306-07. In Mecklenburg and Wake Counties, for example, voter registration drives aimed particularly at increasing black registration began before that date. *Id.* Over the past years, the State Board of Elections has redoubled its

efforts to reach those groups in the State that are relatively underregistered, especially blacks. The Board of Election's most recent campaign included a comprehensive educational program to encourage interest in voting, and new legislation designed to maximize access to registration. Def.Ex. 1-9, 11-15, R. 500-06, 510. At the close of the books prior to the 1982 General elections, the Board's drive had resulted in a 17% increase in registration among blacks. Def. Ex. 14, R. 506, 510. By the adjournment of the 1983 Session, the General Assembly had enacted new legislation providing for more registrars, more registration locations and generally easier access to registration. R. 1335. In spite of these facts, the district court still counted this factor against the defendants because the percentage of eligible blacks registered is lower than the percentage of eligible whites registered.

Although total registration among blacks is still lower than among whites, blacks are registering at a faster rate today than are whites. It is obvious from this statistic alone that no barriers or impediments to registration presently exist. In addition, the mere fact that in the 7 challenged districts, 7 blacks were elected to the General Assembly in 1982 demonstrates that there are no lingering effects of past discrimination.<sup>10</sup>

The Senate Report does not purport to cast in stone the definitive inflexible list of relevant factors to be

<sup>10</sup> The successful black candidates were Dan Blue (Wake County); Annie Kennedy, C. B. Hauser (Forsyth County); Phil Berry (Mecklenburg County); Frank Ballance (Warren County); Kenneth Spaulding (Durham County); C. Melvin Creecy (Northampton County).

considered in Section 2 cases. The factors are meant to be exemplary of the types of evidence which might be relevant, and the relevance of any given item may vary from case to case. *Boykins v. City of Hattiesburg*, No. H77-0062(c) (S.D. Miss. March 7, 1984), at 8. In this instance, this first factor is not particularly relevant, largely because the State's effort to overcome the effects of past electoral discrimination have been so successful. The mere existence of impediments to the exercise of the franchise by minorities at some time in the past should not "in the manner of original sin" continue to be accounted against the State long after the barriers have been removed and the residual consequences ameliorated.

#### **B. The extent to which voting is racially polarized.**

Because courts have generally considered this to be the pivotal factor in Section 2 analysis, this topic is discussed below in detail. Suffice it to say here that the court found "severe" racial polarization in every election in which less than a majority of whites voted for the black candidate—even where the black won and white candidates also received less than a majority of the white vote.

#### **C. The majority vote requirement.**

North Carolina has a majority vote requirement in primary elections only. Stip. 88, 89. The district court found that no black had ever lost a bid for election to the General Assembly because of the majority vote requirement.<sup>11</sup> J.S. 30a. Nonetheless, the court also

<sup>11</sup> Because the one-party nature of the state greatly inflates the importance of victory in the Democratic primary, there is little



found that the majority vote requirement contributed to the dilution of the black vote. Here again, the Court mechanistically counted one of the Senate Report factors against the State without seriously considering the actual impact on electoral access. If no black candidacy has ever been impeded by the majority vote requirement, it is absurd to consider the requirement a circumstance contributing to vote dilution.

**D. The socio-economic effects of discrimination and political participation.**

This criterion from the Senate Report must be read fully and in conjunction with its accompanying footnote 114. The Report states that a court may examine "the extent to which members of the minority group in the state or political subdivision bear the *effects of discrimination* in such areas as education, employment and health, *which hinder* their ability to participate effectively in the political process." S. Rep. at 29. (emphasis added). Thus, a plaintiff may properly introduce evidence, for example, of inferior health care, education, and income among black citizens. The relevance of this highly prejudicial evidence, however, is contingent upon proof that the level of participation by blacks in the political process is depressed.

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support for eliminating the majority vote requirement. In fact, a bill introduced in the General Assembly in 1983 by Rep. Spaulding, who is black, would have merely reduced the requirement to 40 percent. Stip. 90. Interestingly, a study superimposing Rep. Spaulding's proposal on all legislative elections back to 1964 shows that no additional blacks would have won as a result of this change. R. 960-64.

Note 114 confirms this reading. There, Congress expressed its intent that a plaintiff need not prove a causal nexus between disparate socio-economic status and depressed political activity. However, social and economic circumstances have no relevancy at all to the issue of vote dilution if participation by the group claiming dilution is not in fact depressed. Note 114 does not relieve the plaintiffs of proving depressed political participation, it merely relieves them of proving the nexus between the two circumstances.

The court seems to have interpreted this factor and Note 114 to say that evidence of inferior economic and social status is proof of depressed levels of participation in the democratic process. The plaintiffs did indeed offer evidence that blacks fared less well than whites on several socio-economic measures. Stip. 62-84. A witness offered as an expert in political sociology then testified that the lower one's economic status the less likely one is to participate in the political process. R. 402.

Nothing in the record, however, supports the finding that participation by blacks in the electoral process of North Carolina is depressed. Rather, the whole record reflects vigorous participation by blacks in every aspect of political activity. First of all, nearly every one of the plaintiffs' own witnesses recited a series of Democratic party offices, elective offices and appointed political positions in which they had served. See 11-12 *supra*. The activities of just this small group of people cast some doubts on any claim of either depressed participation or unequal opportunity. Witnesses for the plaintiffs also testified about successful volunteer efforts by black leaders and civic groups to



increase voter registration. R. 463-64, 470. This too is hardly reflective of a politically inactive black community. Furthermore, the power wielded by such organizations as the Durham Committee on the Affairs of Black People, R. 670, 1295, the Mecklenburg Black Caucus, R. 453-55, the Raleigh-Wake Citizens Association, R. 1333, the Black Women's Political Caucus, R. 1333, and the Wake County Democratic Black Caucus, R. 1333-34, evidence a vital and sophisticated black organization. Since the plaintiffs failed to prove that political participation on the part of blacks in North Carolina was depressed or in any way hindered, the evidence of disparate economic and social status was not particularly relevant to the issue of whether the challenged legislative districts dilute black voting strength and the court should have rejected this evidence.

#### E. Racial appeals in political campaigns.

The court found that from Reconstruction to the present racial appeals had been "effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns." J.S. 31a. The court apparently accepted the opinions of plaintiffs' expert, Paul Luebke, on this topic.<sup>12</sup> The Court lists 6 elections in which these appeals supposedly were made:

<sup>12</sup> Dr. Luebke's testimony was simply not credible. For example, Luebke insisted that campaign slogans such as "Eddie Knox will serve all the people of Charlotte," and "Knox can unify this city," were racial slurs. R. 345. Most damaging to his credibility, however, was his adamant refusal to admit that what might be a racial appeal in the mind of one person could *never* be a fair

1950 Campaign for U.S. Senate  
1954 Campaign for U.S. Senate  
1960 Campaign for Governor  
1968 Campaign for President  
1972 Campaign for U.S. Senate  
1984 Campaign for U.S. Senate

Of these 6 campaigns, 4 of them occurred more than 15 years ago. One more dates from more than 10 years ago. Only one of the so-called racial appeals cited by the court occurred recently and it did not occur in the context of an election to the General Assembly in any one of the challenged districts. Furthermore, the court's findings were based on Dr. Luebke's opinions unsupported by any systematic analysis or study. The same type of commentary on racial appeals by a plaintiff's expert has been dismissed by a district court as "pure sophistry." *Overton v. City of Austin*, No. A-84-CA-189 (N.D. Tex. March 12, 1985) at 26. The court in *Overton* found the methodology totally wanting because the expert had not interviewed a statistically reliable sample of voters to determine if *they* perceived any racial inferences in the campaign materials labelled "racial appeals" by the expert. *Id.* at 27. Dr. Luebke's research consisted of reading the ads and determining

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political comment in the mind of another. R. 417.

Dr. Luebke insisted, for example, that the white candidates for the Durham County Board of Commissioners made racial appeals throughout their campaign in 1980. R. 350-356. Luebke found the slogan, "Vote for Continued Progress," to be racially offensive. R. 353-54. Nonetheless, two of the five seats in that election were won by blacks and the 5 Commissioners then elected one of the blacks Chairman of the County Board. R. 422-25.

whether they contained coded or "telegraphed" racial messages. He interviewed no one to substantiate his conclusions. R. 418-19.

#### F. The extent to which blacks have been elected.

Despite the considerable electoral success of blacks in the challenged districts, the court found that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the population." J.S. at 37a.<sup>13</sup> This conclusion is simply inapposite to the issue of whether blacks enjoy equal political opportunity in the challenged districts. In the 1982 elections, in the districts in question, 11 black candidates offered for election. Nine won in the Democratic primaries and seven went on to win in the general elections. Three of the four candidates who lost were running for public office for the first time. The fourth losing candidate, Howard Clement, testified that he lost because he did not have the endorsement of the Durham Committee on the Affairs of Black People, R. 1295, and indeed, he received only a small percentage of the black vote. The results of the 1982 legislative elections are hardly consistent with a finding of "minimal" electoral success.

#### G. Responsiveness.

The plaintiffs offered no evidence of unresponsiveness but on cross-examination their witnesses conceded that their legislators were responsive to their

<sup>13</sup> From the Court's recitation of statistics at J.S. 33a, it is clear that this conclusion is based on the percentage of blacks elected statewide, not in the challenged districts.

needs." R. 450-53. The defendants showed and the court found that the effort to increase black registration was directly responsive to the needs of the black community. J.S. 25a. In addition, the court specifically noted that the State has appointed a significant number of black citizens to judgeships and to influential executive positions in state government. J.S. at 47a. Despite the plethora of evidence offered by the defendants, the court did not find that legislators generally were responsive or unresponsive, and they did not examine the effect of this factor on vote dilution. The failure to make such an assessment reflects the court's underlying assumption that effective representation of the minority community demands guaranteed election of minority candidates. Apparently, the court interpreted "of their choice" to mean "of their race." But there is simply no right, constitutional or statutory, to elect representatives of one's own race. *Seamon v. Upham*, Civil No. P-81-49-CA (E.D. Tex. Jan. 30, 1984). See also *Overton v. City of Austin*, No. A-84-CA-189 (W.D. Tex. March 12, 1985). Responsiveness is probative of the existence of access to the political process because a white representative who responds to his black constituency is just as effective, vis a vis the black community, as a black person.

<sup>14</sup> In the legislative session immediately preceding the trial, the General Assembly greatly increased the availability of voter registration. R. 1335. In addition, the budget included an allocation for sickle cell anemia research, a holiday honoring Dr. Martin Luther King was established, and local legislation changing the method of election to the Wake County School Board from a district to an at-large system was passed at the urging of black leaders from Wake County. R. 1333-38.



In its discussion of polarized voting in *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court noted that when a racial majority can win all the seats in an at-large election without the support of the minority, it is possible for those elected to ignore the views and needs of the minority with impunity. 458 U.S. at 616. When this occurs, the members of the minority are essentially excluded from the democratic process because they have no representative voice. It is this very potential to shut blacks out of the process without fear of political consequences which makes unresponsiveness of elected officials one of the indicia of a Section 2 violation. In the present case blacks are not excluded from the process by unresponsive white representatives. White candidates need black support to win, and many black political organizations regularly endorse white candidates. R. 454-55, 464-65, 638, 855, 1234-36. Consequently white officeholders are held accountable by the black community. Under these circumstances, the responsiveness of the members of the General Assembly to the black citizenry further evidences the effective participation of blacks in the political processes of North Carolina.

#### **H. Legitimate state policy behind county-based representation.**

The court found that the use of the whole-counties as the building blocks of legislative districting was "well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications." J.S. at 50a. The court, however, found this evidence irrelevant on the grounds that the legislature could have contradicted established policy to avoid dilution of the black vote.

The court's analysis completely contorts the purpose for the presence of this factor in the Senate Report. Evidence of a consistently applied, long-standing non-racial policy weighs against a finding of vote dilution. As the Senate Report notes, a finding on behalf of the State on this factor would not *alone* negate other strong indications of dilution. Nonetheless, the court's basic finding refutes any suggestion that the use of whole counties as the basic unit of districting was racially motivated.

Based on the totality of circumstances, it is difficult to comprehend how the court concluded that blacks in North Carolina have less opportunity than whites to participate in the political process and to elect candidates of their choice. The court's opinion seems to turn upon its belief that although the evidence proved that blacks could be elected, there was no guarantee that blacks always would be elected from the districts at issue.

Apparently the court thought that guaranteed access required guaranteed victory in as many single-member "safe" seats as could be drawn. The decision removes black voters and candidates from the competitive electoral arena and protects them from the vagaries of political fortune. Certainly Section 2 does not require this.

#### **II. Racially polarized voting is not established as a matter of law whenever less than a majority of white voters vote for a black candidate.**

The district court identified racial bloc voting as the "single most powerful factor in causing racial vote dilution." J.S. 47a. In light of this emphasis,



it was essential to apply the proper legal definition of racial bloc voting. The court, however, accepted the opinion of the plaintiffs' expert that racially polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate.<sup>15</sup> As a result, the court concluded that there was "severe and persistent" racial bloc voting despite the following facts:

a) In the 1982 Mecklenburg House primary, Berry who is black received 50% of the white vote and Richardson who is also black, received 39%. Berry received more votes than any other candidate. R. 189. Both black candidates won the primary. R. 188-89; Pl.Ex. 14(c), R. 85, 112.

b) In the 1982 House general election for Mecklenburg County, 42% of the white voters voted for Berry; 29% of the whites voted for Richardson. Pl. Ex. 14(d), R. 86, 112. In a field of 18 candidates for 8 seats, 11 white candidates received fewer white votes than Berry. *Id.* In that election Berry finished second, and Richardson finished ninth, only 250 votes behind the eighth place winner.

<sup>15</sup> The plaintiffs' expert, Bernard Grofmann, expressed his definition of racial polarization in several ways. Basically, he opined that racially polarized voting occurs when white voters and black voters vote differently from one another. R. 50. Racial polarization is substantively significant when the outcome would be different if the election were held among only the black voters as compared to only the white voters. R. 159. Thus a black candidate who would be the choice of the black voters would have to get a majority of the white vote to win in the hypothetical all-white constituency. Thus Dr. Grofmann's definition of substantively significant racially polarized voting can be reduced to this: it occurs whenever less than a majority of the white voters vote for the black candidate. R. 161.

c) In the 1982 House general election for Durham County, black candidate Spaulding received 47% of the white vote and won the election. R. 183-84, Pl.Ex. 16(e), R. 85, 112.

d) In the 1982 House primary election for Durham County, one black candidate, Clement, received 32% of the black vote and 26% of the white vote. R. 181-82; Pl.Ex. 16(d), R. 86, 112. The black candidate Spaulding received 90% of the black vote and 37% of the white vote. *Id.* Of the two black candidates, only Spaulding was successful in the primary. *Id.* Had the black voters wanted to elect Clement, they could have cast doubleshot votes. R. 184.

e) In the 1982 Senate primary election for Mecklenburg County, the black candidate, Polk, received 32% of the white vote and was successful in the primary. Pl.Ex. 13(j), R. 86, 112.

f) In the 1982 Mecklenburg Senate general election, Polk, a black candidate received 33% of the white vote. The leading white candidate received 59% of the white vote. Pl.Ex. 13(k), R. 86, 112.

g) In the 1982 Forsyth House primary, the two black candidates, Hauser and Kennedy, received 25% and 36%, respectively, of the vote. Pl.Ex. 15(e), R. 86, 112. In a field of 11, Kennedy received more white votes than six of those candidates. Pl.Ex. 15(e), R. 86, 112. Both black candidates won the primary. *Id.*

h) In the 1982 House general election for Forsyth County, Hauser and Kennedy received 42% and 46% respectively, of the white vote. R. 175-76; Pl.Ex. 15 (f), R. 86, 112. The successful white candidates received substantially equal support from black and

white voters—all within a range between 43% and 63%. Both black candidates were successful. *Id.*

i) In the 1982 House primary election for Wake County, a six-member district, the only black candidate running, Dan Blue, received more total votes than any other of the 15 candidates. R. 194-95; Pl.Ex. 17(d), R. 86, 112. Blue received more white votes than 11 of the other candidates. *Id.*

j) In the 1982 House general election for Wake County, Blue ran second out of a field of 17 candidates. R. 195, Pl.Ex. 17(e), R. 86, 112. Blue also received the second highest number of white votes. R. 196; Pl.Ex. 17(e), R. 86, 112.

k) Although there have been relatively few black republican candidates, and they have not been successful, these candidates have always received a greater number of white votes than black votes. Pl. Ex. 16(f), R. 86, 112.

l) Finally, of the 11 elected black incumbents who have sought reelection to the General Assembly in recent years, all 11 have won reelection.<sup>10</sup> R. 178.

The court's conclusion that these facts establish polarized voting simply flies in the face of common sense. In 1982 legislative elections in Durham, Forsyth, Mecklenburg and Wake Counties, all of the black candidates received between 25 and 50% of the white vote. Of 8 Black Democratic candidates in these counties, 5 were elected. These results do not "ap-

<sup>10</sup> The court incorrectly found that "some black incumbents were reelected . . ." J.S. at 40a. Plaintiffs' own expert testified that all black incumbents who had offered for reelection had been successful. R. 178.

proach any realistic legal standard of polarized voting." *Jones v. City of Lubbock*, 730 F.2d 233 (5th Cir. 1984) (reh'g en banc denied).

In *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1984), for example, the Court found that where 35% of the whites voted for the minority candidate, there was no racial polarization. Similarly, in *Collins v. City of Norfolk*, No. 83-526-N (E.D. Va. July 19, 1984), the district court determined that in 3 elections where 32, 31 and 26% respectively, of the whites had voted for a black candidate, there was no legally significant racial polarization, *Collins* at 25.

The definition of racial bloc voting adopted by the court suffers from both conceptual and methodological deficiencies. Whatever merits Dr. Grofmann's definition may have as a theoretical construct it has very little to offer to an analysis of a real political contest where the objective of any candidate, regardless of race, is to win. Grofmann considers racial polarization "substantively significant" when less than 50% of the white voters vote for the black candidate. R. 81. In terms of political reality, this is a wholly arbitrary distinction. Racially polarized voting is significant ("politically," "substantively," "statistically," or otherwise) when the black candidate does not receive enough white support to win the election.

A candidate is primarily concerned with receiving more votes than his opponents, not with the color of the person who votes for him. Discrete and different voting patterns among racial groups concern the candidate when they operate to prevent him from winning. This political reality lies at the root of Congress' inclusion of polarized voting in Section 2



analyses. The mere presence of different voting patterns in the white and black electorate does not prove anything one way or the other about vote dilution. What is probative of vote dilution is voting along racial lines which shuts the minority group out of the process by consistently defeating the candidate of its choice. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). In *Rogers*, this Court described polarization in terms of its capacity to effect actual election outcomes:

Voting along racial lines allows those elected to ignore black interests without fear of political consequences and without bloc voting the minority candidates would not lose elections solely because of their race. 102 S.Ct. at 3731.

In *NAACP v. Gadsden County School Board*, 691 F.2d 978 (11th Cir. 1982), the court quoted the language from *Rogers* as a guide to gaging polarized voting in Gadsden County elections. The court found that black candidates had lost elections solely because of their race. In a county in which blacks comprised 48.5% of the registered voters and in which 14 blacks had run for office since 1972, only 1 black had been elected. Voting by whites along racial lines had prevented blacks from winning elections.

Similarly, in *McMillan v. Escambia County, Florida*, 688 F.2d 960 (5th Cir. 1982) no black had ever served on the County Commission elected at-large. The Court of Appeals noted that "it is sensible in this case as it was in *Lodge* to expect that at least some blacks would be elected absent racial polarized voting." 688 F.2d 960, 966 at n.14. Here again, the court viewed racial bloc voting as probative of the

issue of vote dilution insofar as it excluded blacks from winning elections, and this is its proper legal application. Nothing in the record in this case indicates that racial bloc voting has prevented black candidates from obtaining elective office.

The methodology upon which Dr. Grofmann based his analysis is severely flawed. He analyzed 53 elections using both extreme case analysis and the ecological regression model. In extreme case analysis, those precincts which are nearly all white or all black are examined. For instance if a precinct is 95% white, and a black candidate receives 50% of the votes in that precinct, one can surmise that approximately 50% of the whites voted for the black candidate. This method has limited applicability because of the small number of homogeneous precincts. Regression analysis uses a computer program to compare the proportion of the vote received by black and white candidates in each precinct with the proportion of black and white voters in each precinct.

One fundamental problem with regression analyses is what is called the "ecological fallacy,"—the use of aggregate data to explain individual behavior. Dr. Grofmann did not use turnout figures, but rather compared the registered voters' by race with the election returns for each precinct. This fallaciously assumes that the turnout on any given election day, whether it be 10% or 90% of the voters, exactly mirrors the racial make-up of the voter rolls for that precinct.

The more critical problem is that both extreme case analysis and regression analysis show nothing more than raw correspondence between the percentage of votes for the black candidate and the percentage of



blacks living in a particular precinct. If there is a correlation between these two variables which has statistical significance, then the analyst concludes that race is determining election outcomes. R. 219. But unless the expert has tested variables other than race, he cannot know that race correlates better than, or even as well as, party affiliation, age, religion, income incumbency, education, campaign expenditures, or any other factor that could have influenced the election. R. 1387-89.

Regression analysis, as used by Dr. Grofmann and accepted by the court, increasingly has come under attack because it fails to account for the influence of variables other than race. The model systemically infers, by correlating only two variables—race of the candidate and racial composition of a precinct—that race is the only explanation for the correspondence between the variables.<sup>17</sup> As Judge Higginbotham noted in his concurrence in *Jones v. Lubbock*, “it ignores

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<sup>17</sup> See *McClefkey v. Zant*, 580 F.Supp. 338 (N.D. Ga. 1984), in which the district court provides an exhaustive critique of the regression model. “[T]he regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given.” *Id.* at 370.

Dr. Grofmann virtually admitted this when he explained why he considered no other factors in his analysis: “[R]acial polarization as I have defined it deals with the voting patterns of white voters versus the voting patterns of black voters. Therefore, I look at the voting patterns of white voters versus the voting patterns of black voters to determine racial polarization.” R. 177.

Grofmann also testified that race was the cause of the differences in voting patterns. He stated: “[W]hen black voters consistently rank black candidates one and two in their preference ordering and white voters consistently rank black candidates at the bottom . . . in a society which has a history of racial discrimination and

the reality that race . . . may mask a host of other explanatory variables.” 730 F.2d 233 (5th Cir. 1984) (reh’g. en banc denied.)

In *Lee County Branch of the NAACP v. City of Opelika*, 748 F.2d 1473 (5th Cir. 1973) the Fifth Circuit panel agreed that a court should not place too much reliance on regression analysis in ruling on the issue of racially polarized voting. The court underscored the importance of a multiple variable analysis to establish the true role of race in determining election outcomes. Likewise, in *Terrazas v. Clements*, 581 F.Supp. 1329 (N.D. Tex. 1984) the district court rejected the analysis of the plaintiffs’ expert because he failed to measure the impact of more than one variable. See also, *Overton v. City of Austin*, No. A-84-CA-189 (W.D. Tex. March 12, 1985) (district court adopted the opinion of Judge Higginbotham and rejected plaintiff’s conclusions based on regression); *Collins v. City of Norfolk*, Civil No. 83-526-N (E.D. Va. July 19, 1984) (court rejected plaintiff’s analysis because it did not consider “factors other than race which may greatly influence voting behavior.”) at 21.

The district court inadvertently makes a case against the conclusions drawn by Dr. Grofmann. At the outset the court states that vote dilution occurs when racial bloc voting interacts with an electoral mechanism, such as at-large elections, to deny proportional representation to a racial minority group which has “distinctive group interests.” J.S. at 14a.

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in which there is clear racial polarization, . . . the most plausible explanation is that race is determining the elections.” R. 219.

This is tantamount to saying, there is racial polarization because there is racial polarization.

It is reasonable for people to vote for candidates who represent their interests. And if the political and governmental interests of any group are truly distinctive, alignment of interests might explain differences in voting patterns more cogently than race. Regression analyses as employed by Dr. Grofmann simply cannot account for non-racial factors. In fact, it cannot even establish whether any factor is more important than race in determining election outcomes.

Although the legislative history of amended Section 2 does not discuss racial bloc voting in detail, it does give some indication that Congress was concerned with polarization in voting that effectively locks the racial minority out of the political forum. The Subcommittee on the Constitution criticized the results test on the grounds that it *assumed* that race was the "predominant determinant" of voting preferences. Subcommittee Rep. at 41-44. The Subcommittee noted, that contrary to this assumption, in many jurisdictions racial bloc voting is not monolithic and indeed black candidates enjoy substantial white support. *Id.* The Senate Judiciary Committee responded to this criticism by emphasizing that, in those communities where black candidates do receive substantial white support, "it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process." S. Rep. at 33.

In explaining the reach of the results test, the House Report stated, that "[i]t would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates." H. Rep. at 30. The facts in this case do not even approach the situation contemplated by the House Report.

The plaintiffs in this case have not demonstrated that bloc voting by whites has deprived them of political access *or* electoral success. Black candidates for the General Assembly in 1982 received substantial white support, in many instances more than 40% of the white vote. The record shows that between 1970 and 1982, 27 Black democrats ran in general elections for the General Assembly. Of these, 18 won. R. 147; Pl.Ex. 19, R. 112, 115. Two-thirds of all black candidates have been successful. This is hardly consistent with voting patterns which shut minorities out of the process.

The district court emphasized that "the demonstrable unwillingness of substantial numbers of the racial majority" to vote for black candidates is the "linchpin" of vote dilution. J.S. at 14-15a. The court, however, accepted the theoretical construct of plaintiffs' expert witness and failed to see the simple truth: a substantial number of whites do vote for black candidates; or the more compelling truth: the number of whites willing to vote for black candidates is so substantial, that black candidates win.

#### CONCLUSION

For the reasons stated herein, the decision of the United States District Court below should be reversed.

Respectfully submitted,

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ALEXANDER L. STEIN

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,  
*Appellants,*

v.

RALPH GINGLES, *et al.*,  
*Appellees.*

On Appeal From the United States District Court  
for the Eastern District of North Carolina

**APPELLANTS' BRIEF**

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## QUESTIONS PRESENTED

- I. Whether Section 2 of the Voting Rights Act entitles protected minorities, in a jurisdiction in which minorities actively participate in the political process and in which minority candidates win elections, to safe electoral districts simply because a minority concentration exists sufficient to create such a district.
- II. Whether racial bloc voting exists as a matter of law whenever less than 50 percent of the white voters cast ballots for the black candidate.

### PARTIES TO THE PROCEEDING BELOW

The Appellants, defendants in the action below, are as follows: Lacy H. Thornburg, Attorney General of North Carolina; Robert B. Jordan, III, Lieutenant Governor of North Carolina; Liston B. Ramsey, Speaker of the House; The State Board of Elections of North Carolina; Robert N. Hunter, Jr., Chairman, Robert R. Browning, Margaret King, Ruth T. Semashko, William A. Marsh, Jr., members of the State Board of Elections; and Thad Eure, Secretary of State.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,  
*Appellants,*

v.

RALPH GINGLES, *et al.*,  
*Appellees.*

On Appeal From the United States District Court  
for the Eastern District of North Carolina

**APPELLANTS' BRIEF**

**OPINIONS BELOW**

The opinion of the United States District Court for the Eastern District of North Carolina in this case was rendered on January 27, 1984. A copy of the Court's Opinion and Order is set out in the Jurisdictional Statement at Appendix A.

**JURISDICTION**

The case below was a class action by black voters of North Carolina challenging certain districts in the post-1980 redistricting of the North Carolina General Assembly. The appellants filed their Notice of Appeal on February 3, 1984. This Court noted probable jurisdiction on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

### CONSTITUTIONAL PROVISIONS AND STATUTES

The United States Constitution, Fifteenth Amendment, and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c are set forth in the Jurisdictional Statement at 59a. The following provisions of the North Carolina Constitution are not contained in the Jurisdictional Statement:

Art. II, § 3(3), N.C. Const.

"No county shall be divided in the formation of a senate district."

Art. II, § 5(3), N.C. Const.

"No county shall be divided in the formation of a representative district."

### STATEMENT OF THE CASE

#### The Genesis of the Challenged Redistricting Plans

In July of 1981, the North Carolina General Assembly enacted a legislative redistricting plan in order to conform the State Senate and House of Representative Districts to the 1980 census. In keeping with a 300 year old practice in the State, the plans consisted of a combination of single member and multi-member districts and each district was composed of either a single county, or two or more counties, so that no county was divided between legislative districts. The plaintiffs below filed this action on September 16, 1981 in the United States District Court for the Eastern District of North Carolina alleging among other things, that the multimember districts diluted black voting strength.

In October 1981, in a special session, the General Assembly repealed and reworked the House plan to

reduce the population deviations. Because forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act, the revised House plan and the Senate plan were submitted to the Attorney General for review.<sup>1</sup> The Attorney General interposed objections to both proposals. He found that the state policy against dividing counties resulted in the creation of multi-member districts which in turn tended to submerge black voters in the covered counties.<sup>2</sup>

---

<sup>1</sup> Section 5 of the Voting Rights Act requires covered jurisdictions to either submit any voting change to the Attorney General of the United States or to file suit in the United States District Court for the District of Columbia for declaratory judgment. Section 5 provides in pertinent part:

Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . 42 U.S.C. § 1973c.

<sup>2</sup> In 1968, as part of a general revision of the State Constitution, a provision prohibiting the division of any county between State legislative districts was adopted. Art. II, §§ 3(3), 5(3) N.C. Const. This Constitutional amendment merely codified a practice which had been consistent and unbroken in North Carolina redistricting since the institution of legislative districts in the colonial period.



**B. The finding of vote polarization is not foreclosed by the mere fact that blacks have won a few elections.**

The District Court, using vote polarization only as one factor in its vote dilution analysis, was correct in holding that a few black victories did not, of themselves, prevent the Court from finding vote polarization.

Section 2 of the Voting Rights Act does not protect minority voters only when they are completely shut out of the electoral process. Rather, it bars any practice that creates a climate in which minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

Congress made it clear that a few black victories did not foreclose a vote dilution claim. In its discussion of token black victories, no mention was made of the fact that black victories foreclose a finding of polarization. S. Rep. at 29, n.115 and at 194. Because all of the *Zimmer* factors are mutually independent, a finding that one factor is absent or inapplicable cannot preclude the finding that another is present and critical; therefore, simply because a few blacks win, this does not rebut the separate factor of vote polarization. As a result, the District Court looked for, and found, overall patterns within each district which indicated that citizens in the district consistently voted along racial lines.

Thus, even when blacks win, a pattern of polarization can still be evident. If 90% of the blacks vote for a black candidate and only 25% of whites do so in a district with a population less than 62% white, the black candidate will

win. It is clear that, in this example, vote polarization did not cost the black the election; it should, however, be obvious that significant racial polarization was present. It should be equally obvious that vote polarization can exist in a district when the Court examines other elections in which blacks do lose. One or two black victories cannot make up for a host of black losses. To the extent that Congress indicated its awareness that, in many vote dilution cases, there would be some black victories, it would be erroneous to say that random victories prevent the Court from finding the presence of such an important factor as vote dilution.

In fact, the State's various contentions in this regard constitute a logical morass. It argues that, if the lower Court used an erroneous definition of vote polarization, the Court's decision must be overturned. Implicit in this argument is the principle that vote polarization is integral to a finding of vote dilution. If this were true, however, its argument that black victories preclude the Court from finding vote polarization fails. If black victories defeat a finding of vote polarization, which in turn prevents the Court from holding that black votes are diluted, then the congressional mandate (S. Rep. at 29) that a few black victories do not defeat a vote dilution claim is thwarted.

**III. EVEN IF THE LOWER COURT DID NOT ARTICULATE THE PROPER DEFINITION OF VOTE POLARIZATION, THE RECORD IS REplete WITH FACTS SUPPORTING THE COURT'S FINDING OF IMPERMISSIBLE VOTE DILUTION.**

In *White v. Regester*, 412 U.S. 755, this Court found vote dilution without making a finding of vote polarization. This case is especially pertinent because even the

State concedes that it was Congress' intent to codify the Court's analysis in *White* into the 1982 amendments to the Voting Rights Act. S. Rep. at 22-24. (App. Brief at 16-18) This Court in *White* upheld a District Court's invalidation of multi-member districts in Texas and its resulting order to have them redrawn as single-member districts. The Court justified this holding "[b]ased on the totality of the circumstances." *White*, 412 U.S. at 769.

Specifically, the plaintiff in *White* claimed that the use of multi-member districts was invidiously cancelling or minimizing the voting strength of racial groups in Dallas and Bexar Counties. 412 U.S. at 765. This Court held that, in order to sustain such a claim, the "plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766 (citation omitted).

In examining the multi-member district in Dallas County, this Court outlined the types of evidence that would meet the quoted standard and thereby enable the plaintiffs in a vote dilution case to prevail. It was enough that the District Court examined the official history of racial discrimination, the white dominated political organization which was unresponsive to the needs of minorities, the use of racial campaign tactics and the limited electoral success of blacks. 412 U.S. at 766. The Court also found that Texas election rules, such as a majority vote rule and the "place" rule, which required candidates to run in head-

to-head contests, "enhanced the opportunity for racial discrimination." 412 U.S. at 766.

The findings in *White* are remarkably similar to those of the Court below in this case.<sup>20</sup> It is critical that, in *White*, two blacks had been elected from the multi-member

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<sup>20</sup> The only factor not present in the case at bar and found in *White* is of minor importance. The *White* court found the presence of "a white-dominated" slating organization which "did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." *White*, 412 U.S. at 766-767.

However, "[u]nresponsiveness is considerably less important under the results test." *United States v. Marengo County*, 731 F.2d 1546, 1572 (11th Cir. 1984). In *Marengo*, the appeals court held that the District Court's finding of "no 'substantial lack of responsiveness' " of officials should not weigh heavily against a finding of dilution. 731 F.2d at 1573. The *Marengo* court made two arguments. "First, Section 2 protects the access of minorities not simply to the fruits of government but to participate in the process itself." 731 F.2d at 1572. In other words, even if the needs of minorities are catered to superficially, this fact does not rebut evidence that minorities are excluded from full and equal opportunity to participate in the political process. Second, in contrast to the other *Zimmer* factors, "responsiveness is a highly subjective matter and this subjectivity is at odds with the emphasis of Section 2 on objective factors." 731 F.2d at 1972.

Furthermore, although this one "slating" factor from the *White* case is absent from the instant case, there is an additional factor in this case not present in *White*. When the lower Court in *White* examined Dallas County, it found that "[i]n consequence of a long history, only recently alleviated to some degree, of racial discrimination in public and private facility uses, education, employment, housing and health care, black registered voters of the State remain hindered, relative to the white majority, in their ability to participate effectively in the political process." (J.S. at 26a) The Court in *White* did not find that this factor was present in Dallas County but did state it was an important factor in Bexar County, which contained the other challenged district. 412 U.S. at 768.

district in Dallas County and impermissible vote dilution was still found. Similarly, the District Court in *White* found vote dilution in Bexar County even though five Mexican-Americans had been elected from that multi-member district. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973). Thus, as is argued above, the elections of a few blacks negates neither vote polarization nor the propriety of a finding of impermissible vote dilution.

In summary, *White* found vote dilution without a finding of racial polarization. The court in *White* based its holding on the same findings that the lower Court relied upon here. The only factor not present here is of minimal importance and is more than offset by the additional factor of socio-economic inequality. Consequently, this Court should, as it did in *White*, find that "these findings and conclusions are sufficient to sustain the District Court's judgment with respect to the . . . multi-member districts . . ." 412 U.S. at 767.

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### CONCLUSION

The lower court's holding that House District 8 (Edgecombe, Nash, Wilson) and Senate District 2 (northeastern North Carolina) violate Section 2 should be affirmed on either of two grounds: first, that the notation of probable jurisdiction does not cover the State's appeal as to them; second that together with the other *Zimmer* factors present, the fact that no black has ever been elected to a legislative seat from those districts clearly establishes that the

political processes in those districts was not and is not equally open to minorities.

The lower Court's holding that House Districts 36 (Mecklenburg), 39 (Forsyth), 23 (Durham), 21 (Wake) and Senate District 22 (Mecklenburg/Cabarrus) violate Section 2 should be affirmed because minorities there have neither an equal opportunity to participate in the political process nor an equal opportunity to elect representatives of their choice in that, among other circumstances, (a) prior and current racial discrimination has resulted in dramatically lower voter registration percentages for blacks, (b) elections there are marred by persistent and severe racially polarized voting and (c) only a paltry number of blacks has ever been elected to the legislature from these districts.

Respectfully submitted,

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August 1985



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No. 83-1968

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CLERK

**In the Supreme Court of the United States**

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**BRIEF OF THE  
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## QUESTIONS PRESENTED

- I. Whether the District Court erred in finding a violation of Section 2 of the Voting Rights Act when, based upon the totality of the circumstances, the political process in the challenged districts is not equally open to minorities because (a) the weighted average differential between the registration of black and white age-qualified voters exceeds 15%, (b) elections have been and are marred by persistent and severe racially polarized voting and (c) in the last 15 years, only eight different blacks have been elected to an aggregate of 248 potential seats?
- II. Can a few black victories negate a finding of vote polarization when the difference between the percentage of blacks and the percentage of whites who voted for black candidates is so substantial as to display a consistent pattern of voters casting ballots along racial lines?
- III. Regardless of the definition of racially polarized voting, should the lower Court's finding of a violation of Section 2 be set aside in light of Congress' clear intent to incorporate the analysis of *White v. Regester*, 412 U.S. 353 (1973), into amended Section 2 and the fact that *White* found impermissible vote dilution even without a finding of racial polarization?

## PARTIES TO THE PROCEEDING BELOW

PLAINTIFFS (APPELLEES) in the action below are Ralph Gingles, Sippio Burton, Fred Belfield and Joseph Moody, individually and on behalf of a certified class of all black residents of North Carolina who are registered to vote.

PLAINTIFFS / INTERVENORS (APPELLEES) are Paul B. Eaglin, Mason McCullough and Joe B. Roberts, members of the certified class.

DEFENDANTS (APPELLANTS) are Lacy H. Thornburg, Attorney General of North Carolina; Robert B. Jordan, III, Lt. Governor of North Carolina; Liston B. Ramsey, Speaker of the House; the State Board of Elections of North Carolina; Robert N. Hunter, Jr., Chairman; Robert R. Browning, Margaret King, Ruth T. Semashko, William A. Marsh, Jr., members of the State Board of Elections; and Thad Eure, Secretary of State.

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BRIEF OF THE  
APPELLEES INTERVENORS

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STATEMENT OF FACTS

For seventy years, the State of North Carolina officially, systematically and effectively discriminated against black citizens with regard to the electoral franchise. From 1900 until 1969, a combination of literacy tests, the poll

tax, multi-member districts,<sup>1</sup> anti-single shot laws, numbered-seat plans, majority vote requirements, blatant racist appeals, intimidation, and socio-economic discrimination prevented the election of any black to either the House or the Senate of the North Carolina General Assembly. (J.S. at 22a-33a)

Through the inexorable march of no longer passive public opinion, federal legislative pressure and judicial decisions, the greater part of these discriminatory mechanisms were dismantled, but a few, including multi-member districts, remain.

It was in this context that plaintiffs Gingles, et al., and plaintiffs-intervenors Eaglin, et al., challenged the 1982 redistricting plan adopted by the North Carolina General Assembly, on the grounds that "based upon the totality of the circumstances," (a) six multi-member districts with substantial white voting majorities in areas where there are sufficient concentrations of black voters to form majority black single-member districts and (b) one single-member district which fractures into separate voting minorities a comparable concentration of black voters, in conjunction with the historical, social and political factors elaborated in *Zimmer v. McKeithen*, 485 F.2d 1297

<sup>1</sup> Multi-member districts are, the State asserts, the result of the historical practice in North Carolina of not dividing counties in forming legislative districts. (App. Brief p. 3) The State seeks to imply (App. Brief p. 3, n. 2) that, because Art II §§ 3(3) and 5(3) of the 1968 revision to the North Carolina Constitution "merely" codified historical practice, no discriminatory intent can be inferred. In light of the absence of any requirement for population balance by district prior to *Baker v. Carr*, 369 U.S. 186 (1962) and *Drum v. Sawell*, 271 F.Supp. 193 (M.D. N.C. 1967), however, the chronological coincidence of the 1968 constitutional amendment is remarkable.

(5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam), violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (J.S. at 4a). In particular, plaintiffs contended that their class "have less opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

After an eight day trial before a three judge court consisting of the Honorable J. Dickson Phillips, Jr., Circuit Judge, W. Earl Britt, Jr., Chief District Judge, and Franklin T. Dupree, Jr., Senior District Judge, all North Carolinians, the Court held that the black registered voters in the challenged districts were submerged as a voting minority and thereby had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. (J.S. at 52a)

In the course of its factual examination and conclusions, the Court below made three critical findings relative to whether the members of the plaintiff class have an equal opportunity (a) to participate in the political process and (b) to elect representatives of their choice:

1. In the challenged districts, only 55% of the black voting age population is registered to vote as compared to 70% of the white voting age population, a differential of 15%. (J.S. at 24a-25a; Answer to Interrogatory 1)

2. Elections in the challenged districts have been and are marred by persistent and severe racially polarized voting. (J.S. at 38a)



3. Even in the context of progressive attitudes, legislation and court decisions, only eight different black candidates have been elected in the challenged districts in an aggregate of approximately 248 elections since the first black was elected in 1969.<sup>2</sup>

While the State and the Solicitor-General place different interpretations upon these facts or attack them as a matter of law, they are not seriously challenged. Plaintiffs contend that they are essentially dispositive of this appeal.

### SUMMARY OF ARGUMENT

Amended Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, protects the right of minorities to equal opportunity to participate in the political process, judged in the context of the totality of the circumstance. A violation is established if members of the minority (1) have less op-

<u>Challenged District</u>	<u>No. of Different Blacks Elected</u>	<u>Source</u>
House District 36	1 (Berry)	(J.S. 34a and 41a)
Senate District 22	1 (Alexander)	(J.S. 34a and 42a)
House District 39	3 (Erwin, Kennedy, A., Hauser)	(J.S. 35a and 42a-43a)
House District 23	2 (Michaux, Spaulding)	(J.S. 35a and 43a)
House District 21	1 (Blue)	(J.S. 35a and 44a)
House District 8	—O—	(J.S. 36a)
Senate District 2	—O—	(J.S. 36a)

From 1969-1983, there have been eight elections in the challenged districts which elect 31 members of the House and Senate. (J.S. at 19a and 20a)

portunity than their counterparts in the electorate to participate in the political process and (2) have less opportunity than others to elect representatives of their choice. Congress took the language of amended Section 2 from *White v. Regester*, 412 U.S. 753 (1973), and intended thereby to incorporate the analysis of it and its progeny, including *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

*White*, *Zimmer* and the legislative history of Section 2 enumerate the factors which are relevant to the determination of the two ultimate findings which establish a violation. In the instant case, the District Court held that each and every *Zimmer* factor considered in conjunction with the suspect mechanism of multi-member districts, worked to deny the minority of their statutory rights to equal opportunity to participate in the political process.

In a slightly different analysis than has previously been made, these factors may be appropriately allocated between the two halves of the statutory framework. In particular, minority blacks currently have less opportunity to participate in the political process as a result of (a) the undisputed history of intense and pervasive official discrimination against blacks, the effects of which continue to persist despite the State's recent efforts, (b) the current depressed level of black participation in politics because of the lingering effects of racial discrimination in facilities, education, employment, housing and health, (c) a differential of over 15% between the percentage of age-qualified black and white voting registration, (d) minimal black participation in legislative politics in comparison to black population and (e) the tenuous nature of the state policy, e.g.

not dividing counties, which necessitated multi-membered districts but which had been violated in other districts, to meet population deviation requirements or to obtain Section 5 preclearance.

Similarly, minority blacks currently have less opportunity to elect representatives of their choice because of (a) discriminatory voting procedures, such as a majority vote requirement in primaries (which dilutes or negates the efficacy of "single-shot" voting) and a lack of a sub-district residency requirement in multi-member districts, (b) a consistent history of inflammatory appeals to racial prejudice in political campaigns up to and including the most recent elections, (c) the election of only eight different black candidates to the nearly 250 legislative seat positions available since the first black in this century was elected to the House in 1969 (including the fact that, in two of the challenged districts, no black has ever been elected to the legislature) and (d) persistent and severely racially polarized voting.

With regard to factor (c)—limited black election success—the lower Court *did not* hold that Section 2 had been violated because minorities had not achieved representation in proportion to their percentage of the population. The finding of underrepresentation only triggered the use of the *Zimmer* factors in order to investigate this anomaly under the totality of the circumstances; further, both Congress and the courts accord slight weight to a few minority victories in Section 2 cases. Finally, particularly localized factors such as single-shot voting and some black candidates who are acceptable to and serve the purposes of the dominant majority, mask the discriminatory effects of the submergence of the minority in multi-member districts.

With regard to factor (d), the lower Court *did not* find polarized voting whenever less than 50% of the white voters cast ballots for minority candidates. Instead, the Court properly defined it as existing whenever the difference between the percentage of blacks and the percentage of whites who voted for black candidates is substantial enough to display a consistent pattern of voters casting ballots along racial lines. In other words, it is necessary to examine how both white and black electors vote and the *extent* to which the votes of each are cast along racial lines, together with other, particular circumstances of a given electoral contest, such as whether the black was opposed or unopposed. Once the plaintiff established a *prima facie* case of racial bloc voting through accepted regression analysis techniques, it was the State's burden to introduce evidence of other causative factors, other than race, as rebuttal. Here, the State failed to offer any alternative explanation and should be bound by the findings below.

Even if the lower court did not articulate the proper definition of vote polarization, a finding in this regard is not necessary to establish a violation of Section 2. In *White v. Regester*, this court considered *Zimmer* factors remarkably similar to the one involved here and found impermissible vote dilution without making a finding of vote polarization.

**I. THE DISTRICT COURT PROPERLY FOUND THAT, BASED UPON THE TOTALITY OF THE CIRCUMSTANCES, THE POLITICAL PROCESSES IN THE CHALLENGED DISTRICTS ARE NOT EQUALLY OPEN TO PARTICIPATION BY THE PLAINTIFF CLASS.**

**A. Introduction.**

The question in this case is whether the plaintiff class has been denied the rights guaranteed to it by § 2 of the Voting Rights Act, 42 U.S.C. § 1973(a) and (b). The State asserts a minimal definition of these rights—that they are limited to the bare indicia of the political process which are satisfied if minorities enjoy “active and meaningful participation in politics” (App. Brief p. 15; Sol. Gen. Brief dated July, 1985 p. 20 n.43). Similarly, the State attempts to characterize plaintiffs’ contentions and the decision of the Court below as requiring the very proportional representation prohibited by the proviso to § 2(b). (App. Brief at 14, 15, 19, 20, 21, 33; Sol. Gen. Brief dated July, 1985 pp. 6-7)

The Court below expressly eschewed any requirement of proportional representation (J.S. at 15a) and plaintiffs certainly do not urge that result, which is clearly contrary to the statutory command. On the other hand, that statutory command is equally clearly broader than the State’s contentions. Section 2 defines the denial of the protected right—that “the political process [be] . . . equally open to participation by” the minority—in two terms: that its “members have less opportunity . . . to participate in the political process” and that its “members have less opportunity . . . to elect representatives of their choice.” The definition urged by the State—“active and meaningful participation” applies only to the first half of the statutory framework.

The task before this Court, and the parties to this case, is to define the second half of the statutory framework, the meaning the phrase dealing with plaintiffs’ showing they have been denied equal “opportunity . . . to elect representatives of their choice.” Thus, we must locate the point on that complex spectrum where, by virtue of the application of a legal standard, minorities are so electorally successful that they have, in fact, had an equal opportunity to elect representatives of their choice. This point must not, however, be so extreme as to be a requirement of proportional representation.

**B. The Interaction between the Zimmer Factors Present and the Use of Multi-Member Districts Denies Minorities an Equal Opportunity to Participate in the Electoral Process and to Elect Representatives of Their Choice.**

As presaged by the foregoing Introduction, plaintiffs urge that the *Zimmer* factors and the challenged electoral mechanism be examined in light of the double framework of § 2. We will allocate the *Zimmer* factors to that half of the framework to which they are actually more, or solely, applicable.<sup>3</sup> In this fashion, “equal opportunity to participate” is defined in terms of (a) the history of racial discrimination against black citizens in voting matters, (b) the effects of racial discrimination in facilities, education, employment, housing and health, (c) limitations on actual voting by black citizens, (d) the increased participation, if

<sup>3</sup> This mode of analysis allows for the use (and proper allocation) of additional factors which are not foreclosed by the legislative history or *Zimmer* and which may be applicable to this or any other case.



any, by black citizens in the political process and (e) the fairness of the State legislative policy underlying the challenged redistricting.

Similarly "equal opportunity to elect" may be circumscribed by (a) limiting voting procedures, (b) the use of racial appeals in political campaigns, (c) the limited extent of election of blacks to public office and (d) racial polarization in voting.

It is plaintiffs' crystal conviction and the unambiguous factual findings of the Court below that the combination of the *Zimmer* factors with the use of multi-member districts has deprived them of *both* (a) the equal opportunity to participate in the electoral process *and* (b) the equal opportunity to elect representatives of their choice.

# **1. Equal Opportunity to Participate**

## **(a) The history of racial discrimination against black citizens in voting matters.**

In contrast to the State's assertion, the Court below did not saddle the State of North Carolina with "an original sin." (App. Brief at 27) Instead, the Court found that, because of the extent and virulence of the undisputed history of official discrimination, its effects were still being currently felt. (J.S. at 22a) Even after most of the impediments to black voting were removed and some efforts were made by the State to increase black registration, the registration of age-qualified blacks is overwhelmingly less than that of age-qualified whites in

each of the counties which make up the challenged districts.<sup>4</sup> (J.S. at 24a-25a)

In fact, in five of the counties, including one of the largest (Wake), the registration differential between whites and blacks has remained virtually unchanged during the very period (1978-1982) relied upon by the State to demonstrate the so-called "progress" upon which it depends to overcome the findings and conclusions of the Court below. (*Id.*) In contrast, the Solicitor-General recognizes that these registration differentials are an appropriate and, here, telling point. (Sol. Gen. Brief July, 1985 p. 26) Indeed, plaintiffs urge that they are dispositive proof that minorities are currently denied an equal opportunity to participate in the political processes of the challenged districts. As such, the registration differentials are discussed in greater detail at subsection (c) *infra*.

## **(b) The effects of racial discrimination in facilities, education, employment, housing and health.**

The Court below also found that the socio-economic effects of racial discrimination had depressed minority political participation. (J.S. at 26a) The State contends that the Court jumped to this conclusion despite the absence of proof that "participation by blacks in the electoral process is depressed." (App. Brief at 29) In fact, however, the evidence was that economically disadvan-

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<sup>4</sup> The Court acknowledged the preceding governor's attempt to increase the registration of blacks, but found that, unlike the multi-member districts which, absent this lawsuit, would be with us forever, there was no guarantee that the efforts to increase black registration will be continued past the end of that administration. (J.S. at 25a)

tagged blacks, for whom political contributions are a burden, are even more hampered by the extra cost of multi-member campaigns. It is noteworthy that the Solicitor-General does not share the State's misconception; in fact, his brief does not challenge the lower Court's finding in this regard.

Even more important, the State's attempt to show that black political participation is not depressed is disingenuous. The litany of Democratic party offices, political positions and elected offices held by minorities in the challenged districts is virtually all either intra-party, appointive or local in nature. While there may be less question that black participation is depressed at the local level, the important inquiry is whether it is depressed at the legislative district level. The only relevant proof of black political participation at the legislative district level which the State can cite are the few black representatives and senators elected since 1969, both in the challenged districts and elsewhere.<sup>5</sup> Even with regard to these electoral successes, the critical fact is that many of them are the result of single-member districts, the very relief sought in this case.<sup>6</sup>

**(c) Limitations on actual voting by black citizens.**

The fact that blacks are registered to vote at a far lower rate than whites is virtually definitional of the

<sup>5</sup> Discussed in detail below in Section IB under heading "2-Equal Opportunity to Elect Representatives of Their Choice."

<sup>6</sup> In the course of the 1982 redistricting, the legislature created single-member districts in counties not involved in this case, such as Guilford (Greensboro). As a result, blacks have enjoyed increased electoral success.

lack of equal participation. Based upon the registration statistics presented in this case, it is painfully evident that blacks do not, indeed, cannot, equally participate in the electoral process with whites. In the two largest counties involved in this case (Mecklenburg and Wake), the disparity between white and black registration is well over 20%. In only a few of the smaller counties does the voter registration disparity decline to a still crippling 10%. Thus, in the counties that contain the most blacks, their opportunity to participate, as defined by registration rates, is the least. In fact, when the percentage registration statistics for each county in the challenged districts are applied to the absolute numbers of the voting age population in the county, the effect of the vast differential between black and white registration in the more populous counties is clear. While the numerical average of the registration differentials is 12.6%,<sup>7</sup> the weighted average is 15%.<sup>8</sup>

This current indicium of the lack of equal opportunity to participate is even greater in light of the fact that, between 1980 and 1982, statewide white registration has dropped by 112,000 and black registration has increased by 12,096. (App. Brief at 13) Even with these black gains and white losses, black registration still lags so substan-

<sup>7</sup> This figure is the numerical average of the difference between the percentage of blacks of voting age who are registered and the percentage of whites of voting age who are registered, as set forth in the opinion of the Court below in J.S. at 24a-25a (10/82 figures).

<sup>8</sup> This figure is the weighted average obtained by applying the differentials from J.S. at 24a-25a to the voting age population statistics for each county found in Plaintiffs' Exhibit 87.

tially behind white registration as to constitute irrefutable proof that, in the challenged districts, blacks do not have an equal opportunity to participate in the political process.<sup>9</sup>

**(d) Increased participation, if any, by black citizens in the political process.**

The trial court found that, despite the very recent increase in black participation in politics, this factor did not overcome "entrenched racial vote polarization" and, compared to the overall black population, black participation remained "minimal." (J.S. at 47a) While the State's Statement of the Case does contain references to some facts which the trial court weighed in reaching this finding, the State does not separately dispute this finding in its brief, and therefore, this finding is not subject to review. *See generally Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

**(e) The fairness of the State Legislative policy underlying the challenged redistricting.**

As a final factor bearing upon the lack of equal opportunity to participate, the Court found that the State's justification for creating the challenged districts did not overcome other factors which established vote dilution. The Court quoted the Senate Committee Report which evidences Congress' intent that "even a consistently applied practice premised on a racially neutral policy would not

<sup>9</sup> According to the testimony of Mr. Spearman, Chairman of the Board of Elections, even at this extraordinary rate of "catch up", over a decade would be required to equalize the registration percentage.

negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." (J.S. at 49a, quoting S. Rep. at 29, n.117) Plaintiff Gingles made a compelling showing using the other *Zimmer* factors that "no state policy, either as demonstrably employed by the legislature in its deliberations, or as now asserted by the state in litigation, could 'negate a showing here' [of] actual vote dilution. . ." (*Id.*)

The Court specifically examined the proffered justification. The State argued it had an unbroken historical policy of not dividing counties in the formation of legislative districts and that, as a result, the use of multi-member districts was necessary. Prior to *Baker v. Carr*, 369 U.S. 186 (1962), however, multi-member districts were not "necessary" to avoid splitting counties because there was no requirement that districts be balanced in population. Thus, at most, the State's interest was in preserving a hoary relic.<sup>10</sup> Moreover, the Court below found that, whatever its genesis, this policy could not justify diluting the votes of minorities, especially when it was not sufficiently sacred to forestall the splitting of counties to meet population deviation requirements or to obtain Section 5 pre-clearance. (J.S. at 50a) Put another way, the State's alleged "policy" was properly viewed as a smokescreen.

**2. Equal Opportunity to Elect Representatives of Their Choice.**

**(a) Limiting voting procedures.**

The second prong of the *Zimmer* factor dichotomy concerns the equal opportunity of the minority to elect repre-

<sup>10</sup> Please also see footnote 1, *supra*.



sentatives of their choice. In Section 1(c) above, we discussed *direct* limitations on participation, the most important being diminished black voter registration. In this section, the concern is with the *indirect* effects of voting procedures on the practical capacity of minorities to elect the candidates of their choice.

In this connection, the Court found that North Carolina voting procedures, such as the majority vote requirement in primaries and a lack of a subdistrict residency requirement, had an adverse impact on black voting strength. (J.S. at 29a-30a) In multi-member districts, majority vote requirements have the practical effect of eliminating the possibility that the majority voters will so spread their votes over the white candidates as to allow a minority candidate to rank sufficiently high to obtain a seat because of concentrated support from the minority.

This requirement diminishes the effectiveness of "single-shot" voting—the primary technique that minorities have to combat vote dilution in a multi-member district. With this requirement, minorities can no longer elect their candidate by concentrating their votes. They must depend upon some cross-over votes from the white voters in order to attain majority status for any black candidate.

Even though the Court found no black candidate for election to the General Assembly had failed to win an

election solely because of the majority vote requirement,<sup>11</sup> it "exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts to elect candidates of their choice." (J.S. at 30) Congress did not, however, require that a plaintiff in a Section 2 case must actually show that this limitation had affected an election in the past. Congress was concerned with the interplay between this rule and the suspect voting procedure (multi-member districts). Thus, the statutory focus is on the *potential* for affecting *future* elections. In approving the relevance of this factor, the Congressional report noted that the inquiry was "the extent to which the state . . . has used . . . majority vote requirements . . . or other voting practices or procedures that *may* enhance the opportunity for discrimination against the minority group . . ." S. Rep. at 28 (emphasis added) If Congress had desired to impose a showing of actual impact on electoral success, it would have used "have enhanced", not "may enhance".

Additionally, North Carolina lacks a subdistrict residency requirement; therefore, all candidates for the legislature in the multi-member district may be from areas outside black neighborhoods. See *White*, 412 U.S. 766, n.10. This factor makes it far more likely that the majority

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<sup>11</sup> The State asserts that, because of this fact, the lower Court's finding in this regard is "absurd." We argue in the text following this footnote that Congress did not intend the factor to be interpreted only in the past tense. In addition, the Court below was well aware of the fact that a black candidate [H. M. Michaux, currently a member of the House from challenged District 23 (Durham)] lost his 1980 bid for Congress from the district which includes challenged district 23 because of the majority vote requirement in the Democratic primary.

voters will elect all of the representatives in the multi-member district, as was actually the case in the challenged districts. (Plaintiffs' Exh. 4-8)

**(b) The use of racial appeals in political campaigns**

The use of racial appeals in political campaigns affects the opportunity that blacks have to elect candidates. The Court found that "[t]he record in this case is replete with specific examples of this general pattern of racial appeals in political campaigns." (J.S. at 31a) Additionally, for the past thirty years the Court found racial appeals to be "widespread and persistent." (J.S. at 32a)

A logical inference to be made from these findings is that these appeals have been successful in electing majority candidates. If they were not, then candidates using them would have been weeded out in the political marketplace. With this inference, it is easier to understand the syllogistic relationship between racial appeals and multi-member districts. As shown by the fact that appeals to race is a successful election technique, voters in these districts tend to vote along racial lines. Because of the use of multi-member districts, the majority voter's practice of voting along racial lines lessens the opportunity for minorities "to elect representatives of their choice."

In an attempt to cast doubt on the lower Court's findings, the State has selectively chosen six campaigns in which it concedes that racial appeals were made. The State then implies that these six national campaigns were the only campaigns which underlay the Court's finding. (App. Brief at 31) In fact, however, the Court explicitly found that "[n]umerous other examples of assertedly more subtle forms of 'telegraphed' racial appeals in a

great number of local and statewide elections, abound in the record." (J.S. at 32a)

Once again the State makes an excellent argument for this Court to defer to the findings of the lower Court which were based on days of testimony, hundreds of exhibits and an intimate knowledge of the North Carolina political environment. (See Appellee's Motion to Dismiss or Affirm at pp. 8-42 for a full discussion of this argument.)

**(c) The extent of election of blacks to public office.**

**(d) Racial polarization in voting.**

The extent to which blacks have been elected to office and racially polarized voting bear directly and critically on the question of whether blacks have an equal opportunity to elect candidates of their choice. For a full discussion of each item, see Section III and Section II C and D, respectively, *infra*.

**C. The Court Did Not Hold that Section 2 Had Been Violated because the Multi-Member Districts Prevented Proportional Representation for Minorities.**

In an attempt to substantiate its claim that the Court has committed an error of law, the State has seriously misconstrued the opinion below. The State quotes the Court's language that minorities are "'effectively denied the political power to further those interests that numbers alone would presumptively give [them] in a voting constituency not racially polarized in its voting behavior,'" (App. Brief at 20) and then claims that this statement was the only factor upon which Court based its findings of vote dilution. (*Id.*)

This interpretation is erroneous for two reasons. First, the District Court explicitly acknowledged that a violation of Section 2 cannot simply be based on "the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population." (J.S. at 15a) (citation omitted) Second, if the District Court believed this one fact was enough to warrant a finding of a statutory violation, it would not have been necessary for the Court to discuss and weigh the numerous other *Zimmer* factors that are present in this case.

Instead, the lower court correctly analyzed the evidence and found that blacks were "presumably" underrepresented so as to trigger a further investigation into the causes of this underrepresentation anomaly. If blacks are not represented proportionately in a jurisdiction, this is not a *per se* violation of Section 2. Rather, it is an anomaly which might be caused by illicit denial to a minority of their opportunity to participate in the political process or which might be founded in some other benign factor. This very underrepresentation is, however, one circumstance that courts are explicitly allowed to use in finding that the minority have less opportunity to elect representatives of their choice. 42 U.S.C. § 1973(b).

In contrast, it is the State which seeks to disregard the "totality of circumstances" standard by focusing on one *Zimmer* factor. The State asserts that, "[t]he degree of success at the polls enjoyed by black North Carolinians is sufficient *in itself* . . . to entirely discredit the plaintiffs' theory that present legislative districts deny blacks equal access to the political process." (App. Brief at 24) (em-

phasis added) Ignoring Congressional as well as judicial statements that the extent to which blacks are elected is just one factor to consider in a Section 2 claim, the State asserts that, solely because there have been 18 black victories in the challenged districts, no violation can be found. *Id.* The State's argument fails for two reasons.

First, the number 18 is triply misleading (a) because it includes two blacks elected from districts not challenged here (House Districts only partially within Senate District 2), (b) because it aggregates all of the black victories attained in the *seven* challenged districts and (c) because this number of victories is infinitesimal in the context of the number and years of elections since 1900 in which black candidates were not even at the starting block, let alone the finish line. Lumping victories together masks the true effects that these multi-member districts have on the minority's ability to participate in the electoral system. Adhering to the judicial mandate which requires an intensely localized examination of the facts involved in Section 2 claims, *White v. Regester*, 412 U.S. at 769, the number of victories are put in their proper perspective only when disaggregated into their respective districts and compared to the number of elections lost.

In both House District 8 (Edgecombe, Nash, Wilson) and Senate District 2 (Eastern North Carolina), no black has ever <sup>12</sup> been elected to the legislature.<sup>13</sup> To the ex-

<sup>12</sup> As pointed out above, it must be remembered that "ever" is a long time in North Carolina politics—since 1900, eighty-five years and three generations ago.

<sup>13</sup> Two representatives have been elected from House Districts within Senate District 2, but these two House Districts are not being challenged in this lawsuit.



tent that the State relies on black victories in order to outweigh the rest of the *Zimmer* factors, the State must concede a violation in at least these two districts.<sup>14</sup> The State acknowledges this fact when it cites the authoritativeness of the House report's statement that

[i]t would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates. H. Rep. at 30.

The white majority having always defeated the minority candidates in House District 8 and Senate District 2, there should be no question left of the propriety of the lower Court's conclusions and order with regard to them.

In the rest of the districts, the asserted "substantial" black successes actually constitute only a pitiful "few" victories when they are disaggregated. In House District 36 (Mecklenburg) and Senate District 22 (Mecklenburg/Cabarrus) only one black from each district has ever been successful. (J.S. at 34a) In House District 21 (Wake) only one black candidate has ever been successful, and he was reelected only once. (J.S. at 35a) In House District 39 (Forsyth), three blacks were elected but only one of these was elected for two terms and the two elected in 1982 were successful only after this litigation was begun. It is important that the black victor, Hauser, testified at the trial that whites had suddenly become extremely supportive of his campaign. (See Hauser Deposition) (J.S. at 35a) House District 23 (Durham) has had the most rep-

<sup>14</sup> In addition, as the Solicitor-General correctly notes in his brief (Sol. Gen. Brief July, 1985 p. 7, n.11), this Court's notation of jurisdiction does not encompass the State's challenge to the District Court's conclusions with regard to House District 8 and Senate District 2. As a result, summary affirmance would seem required. They are discussed here only because the picture of racial vote dilution in those districts is illustrative of the other challenged districts.

resentation by blacks, having a black member of the House every year since 1973. (*Id.*) Even these five victories are, however, insignificant when one considers that there have been only two individuals involved and that the incumbent since 1978 (Kenneth Spaulding) has run uncontested each time in either the primary, the general election, or both. The Court below, all of whose members are from North Carolina, was well able to understand this phenomenon based upon its judicial notice of the fact that Mr. Spaulding is a member of one of the most prominent Durham business families.<sup>15</sup> In this connection, Mr. Lovett, the President of the Durham Committee on the Affairs of Black People, testified without contradiction that a necessary factor in the Committee's solicitation of black candidates was its perception of the black candidate's acceptance by the white community, with particular emphasis on

<sup>15</sup> The State asserts that the minority's right to elect candidates of their choice is not tantamount to the right to elect candidates of their race. (App. Brief at 33) If this contention be true, the converse is equally so—the election of a particular black may not be probative of the minority's ability to elect candidates of *their* choice.

When minority candidates run unopposed in a political context with a history of very recent official discrimination and persistent racially polarized voting (including the refusal of whites to vote for even the unopposed blacks), a Court should give more than a passing scrutiny to the probative value of their election "success." A more appropriate inference would be that the black candidate in question was acceptable to the dominant white majority while alleviating potential racial unrest in non-political areas.

The other side of the same coin is the well-known political fact that Republicans do not contest the seats of many conservative Democrats in the South. In neither case, however, does the minority actually have the opportunity to elect representatives of *their* choice. In the first case, the black minority gets an official of their race but whose economic interests are more aligned with those of the dominant white majority;

(Continued on next page)

the candidate not being outspoken with respect to the particular concerns of the black community.

Second, Congress and the courts have been explicit with regard to the slight weight which should be afforded to a few minority victories in Section 2 claims. In *Zimmer*, the defendants argued that the victories of three blacks in a challenged district should foreclose a finding of vote dilution. 485 F.2d at 1307. The Court rejected this argument on the ground that it would "merely be inviting attempts to circumvent the Constitution" by encouraging those who wish to thwart a successful challenge to an electoral scheme to engineer the election of a few blacks. 485 F.2d at 1307. The mere possibility of encouraging attempts to thwart vote dilution cases in this manner was enough for the Court to reject the defendants' argument, without requiring a factual finding that such an attempt had actually occurred.

Congress has also emphasized that black success is just one factor among the totality of circumstances to be

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(Continued from previous page)

in the second, the Republican minority gets an official suitable to its economic interests but who will vote with the opposition on the critical question of organizing the House or Senate. In both cases, the result is a half-way house for a minority as yet only partly enfranchised. In the case of the black minority, however, the right to full political equality is guaranteed by § 2.

Perhaps even more important, the extent to which the political compromise suggested by the anomaly of a black running unopposed by the dominant white majority should be considered *pro* or *con* the State in the evaluation of this *Zimmer* factor, is uniquely a question for the trier of fact, in this case a Court of three distinguished citizens of the jurisdiction in question. With the benefit of their local knowledge, experience and appreciation, they have decided that the greater weight of the factor cuts against the State; that appropriately inspired conclusion should not be disturbed here.

considered. S. Rep. at 194. Thus, isolated victories are not dispositive of vote dilution; instead, their paucity confirms the lower Court's finding that blacks have been unable to elect candidates of their choice in the challenged districts.

**D. Because of Single-Shot Voting Techniques, Limited Black Electoral Success May Mask the Results of a Discriminatory Law.**

Single-shot voting may enable blacks to be elected, yet they will still have less than the statutorily required equal opportunity to elect candidates of their choice. By the use of single-shot voting, blacks will appear to enjoy some success at electing candidates of their choice, while they are actually being deprived of their right to vote for a full slate of candidates. (J.S. at 41a)

When minorities are placed in a multi-member district, one of the techniques they use in order to get a particular candidate elected is to "single-shot" their vote. In theory, the minority voters will all vote for the minority candidate and not cast the rest of their votes for any other candidates in the race. This tactic deprives the other candidates of the minority vote and, thus, the minority candidate has a better chance of being elected as one of the top vote getters.

In order to use this method to elect their candidate, the minority must forfeit their right to vote for any of the other representatives from their multi-member district. In contrast, the majority voters are able to cast all of their votes. The majority is able to influence the election of all representatives while the minority, by "single-shot" voting, is only able to influence the election of one represent-



ative. If the minority chooses not to "single-shot" vote in a multi-member district with several *Zimmer* factors present, they will be deprived of *all* opportunity to elect a candidate of their choice. Either way, they will have less of an opportunity to elect candidates of their choice than the majority voters and are thereby deprived of their statutorily guaranteed right.

**II. THE COURT PROPERLY USED A DEFINITION OF VOTE POLARIZATION WHICH WOULD BE APPLICABLE TO JURISDICTIONS IN WHICH BLACKS WIN A FEW ELECTIONS.**

**A. Vote polarization exists whenever the difference between the percentage of blacks and the percentage of whites who voted for black candidates is substantial enough to display a consistent pattern of voters casting ballots along racial lines.**

To interpret raw statistics under a vote dilution claim, the Court must look at the alternatives available to voters. The lack of white candidates in some races will uncharacteristically increase the minority candidates' vote totals. Even in races such as these, however, pieces of the pervasive vote polarization pattern can still be discerned. For example, black candidates may receive some white support in a few elections but that support is still far less than the almost unanimous support of black voters. This difference in voting conforms to the pattern of racial bloc voting already established in other races in these districts. In this case, the lower Court utilized precisely this analysis in its extensive discussion of and findings with regard to specific elections in the individual districts. (J.S. at 38a-46a)

Contrary to the assertion of the State (App. Brief at 36), the lower Court *did not* find racial bloc voting when-

ever less than 50% of the whites voted for the black candidate. This definition was implicitly disavowed by the lower Court. For example, in the Court's discussion of polarized voting in Mecklenburg County, it pointed to the fact that black candidate Berry received 50% of the white vote. The Court still found polarized voting in Mecklenburg despite this fact because, in the race in which Berry received these votes, there were only seven white candidates running for eight positions. (J.S. at 42a)

Similarly, in Durham County, when a black candidate received votes from 43% of the white voters in the 1982 General Election, the Court once again found evidence of polarized voting. (J.S. at 44a) The black in this election ran unopposed. Thus, the Court found that 57% of the white voters failed to vote for the black candidate *even when no other choice was available*. In comparison only 11% of the blacks failed to vote for the unopposed black. The Court held, compellingly so, that the voters in this election clearly voted along racial lines despite the fact that the black candidate obtained substantial white support and actually won the election.

In this same vein, vote polarization cannot simply be found as a matter of law if less than 50% of the whites vote for the black candidate. The appellants set up a "straw man" by accusing the lower Court of using this definition. It completely ignores the standard by which courts, including the District Court in this case, decide whether the percentage of white votes attained by the black candidate is aberrational. The standard actually used not only focuses on the white support for black candidates, but also includes an examination of the way blacks voted. Simply because less than 50% of the whites voted



for a black candidate tells the Court only half the story of polarization. If less than 50% of the blacks also voted for the black candidate, then no polarization is shown.

The Court below certainly understood and appreciated this principle when it cited the 1978 elections in House Districts 39 (Forsyth) and 23 (Durham) where the black candidates, Sumter and Barnes, each received less than 50% of the votes of both blacks and whites. Thus, inherent in any definition of polarization is a comparison between the voting habits of two groups.

The State argues that because blacks have received white support past certain numerical levels that polarization cannot be found. Vote polarization cannot be defined so discretely because it exists on a spectrum. Congress did not expect courts to generate an absolute cut-off point with respect to the percentage of white votes obtained which would foreclose a finding of vote polarization. In listing the *Zimmer* factors, Congress instructed the courts to examine "the extent to which the elections of the State or political subdivision is racially polarized." S. Rep. 97-417 at 29 (emphasis added). For Congress, the finding of racial polarization is just one factor which, itself, can exist at many different levels of intensity.

The Courts, also, have recognized that polarization cannot be defined discretely. In *United States v. Marengo County*, the Eleventh Circuit recognized that polarization can be shown through direct statistical evidence or it can "be indicated by a showing under *Zimmer* of . . . past discrimination in general . . . , large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts.' " 731 F.2d 1546, 1567,

n.34 (1984) [quoting *Nevett v. Sides*, 571 F.2d 209, 223, n.18 (5th Cir. 1978)]. Because polarization can be shown on the basis of nonstatistical evidence, it is not a concept rebutted by a defined cut-off point.

In the instant case, the finding of vote polarization was based on far more evidence than that which was held to be sufficient in *Rogers v. Lodge*, 458 U.S. 613 (1982). In *Rogers*, this Court affirmed a District Court's finding that the at-large system of electing commissioners in Burke County, Georgia, was being maintained for "invidious purposes." 458 U.S. at 616. In this Court's examination of the *Zimmer* factors present, evidence of vote polarization was deemed "overwhelming", 458 U.S. at 623, based solely on statistics generated when two blacks ran for county commissioner.<sup>16</sup>

In *Rogers*, the District Court had examined three precincts with a clear majority of blacks and one precinct with a bare majority of blacks. The Court compared the two black candidates' successes in these four precincts with their relative lack of success in predominantly white precincts. Statement as to Jurisdiction at 73a, *Rogers v. Lodge*, 458 U.S. 613 (1982). One black won in all four black precincts and lost in all of the white precincts. *Id.* The other black candidate won in three of the four black precincts and lost in the white precincts.<sup>17</sup> *Id.*

There are two relevant points to make about this Court's finding of vote polarization based upon the facts in

<sup>16</sup> In contrast, the *Gingles* District Court analyzed between five and 15 elections in each district.

<sup>17</sup> It was not made clear whether this second black candidate lost in a district with a clear or bare majority of blacks.

*Rogers*. First, the Court did not require the blacks to win in every black precinct in order to find vote polarization. Thus, even though the blacks did not enjoy unanimous black support, polarization was still found. Similarly, as in the case at bar, even though some whites voted for a black candidate, this fact did not foreclose a finding of vote polarization.

Second, the *Rogers* Court relied on the District Court's finding of vote polarization and did not examine the record further to establish by how much the black candidates lost in each of the white districts. Instead, it was sufficient for a finding of vote polarization that blacks basically won in the black precincts and basically lost in the white precincts.

In contrast, in this case, the lower Court's conclusion is supported by a regression analysis which established the degree of black and white support for the black candidates in each race. As a result of this analysis, the Court found not only that blacks almost uniformly lost in white majority districts but also, and more importantly, that *in all cases* the support of black candidates by white voters differed fundamentally and dramatically from the support of black candidates by black voters. In other words, the lower Court in this case complied with Congress' mandate to determine the "extent" as well as the fact of racial polarization. S. Rep. 97-417 at 29.<sup>18</sup>

<sup>18</sup> Both the State (App. Brief pp. 41-44) and the Solicitor-General (Sol. Gen. Brief July, 1985 p. 30 n.57) disparage the regression analysis relied upon by the lower Court. They are apparently unaware or ignore the fact that the State's own expert

(Continued on next page)

By presenting a study that correlated a candidate's race with the race of voters, plaintiff Gingles made a *prima facie* showing of vote polarization. This showing could have been rebutted by the State if it had presented other studies which showed that factors other than race better explain the election results.<sup>19</sup> For example, in *Terrazas v. Clements*, the District Court refused to find polarized voting when an hispanic candidate received 90% of the votes in "hispanic districts" and only 35% of the vote in "anglo districts." 581 F. Supp. 1329, 1352 (N.D. Texas, 1984). The defendant there rebutted plaintiff's *prima facie* case with evidence that hispanics and whites voted along party lines, which explained the results in more elections than did the racial polarization theory. 581 F. Supp. at 1352. In contrast, the State here made no such attempt to rebut Gingles' *prima facie* showing (J.S. at 38a, n.29) which, consequently stands unchallenged.

(Continued from previous page)

"did not question the accuracy of the data, its adequacy as a reliable sample for the purpose use, nor that the methods of analysis used were standard in the literature." (J.S. at 39a, n.29)

In addition, the general reliability of the plaintiff's expert analysis "was further confirmed by the testimony of Dr. Theodore Arrington, a duly qualified expert witness . . . . Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization . . . ." (*Id.*)

<sup>19</sup> The Solicitor-General concurs that the burden of going forward shifts to the defendant after the plaintiff has made out a *prima facie* case. Sol. Gen. Brief July, 1985 p. 30 n.57) See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

17  
No. 83-1968

Supreme Court, U.S.

FILED

SEP 21 1985

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,  
*Appellants,*  
v.  
RALPH GINGLES, *et al.*,  
*Appellees.*

On Appeal from the United States District Court  
for the Eastern District of North Carolina

**JOINT APPENDIX**

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PROBABLE JURISDICTION NOTED APRIL 29, 1985

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**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

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9.16.81	Complaint
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11.13.81	Plaintiff's Motion to Supplement Complaint
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1.29.82	Defendant's Motion to Consolidate with No. 81-1066-Civ.5
2.18.82	Order Consolidating No. 81-803-Civ.5 with No. 81-1066-Civ.5
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4.23.82	Application for Hearing on Preliminary Injunction
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5.12.82	Motion to Consolidate 82-545-CIV-5 with 81-803-CIV-5 and 81-1066-CIV-5
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## DOCKET ENTRIES (Cont.)

<i>Date</i>	<i>Documents</i>
8.18.82	Motion to File Third Supplement on Amended Complaint
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7.22.83	Motion to Intervene Granted
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9.22.83	Order entering Summary Judgment in favor of Defendants In 82-545-CIV-5
10.07.83	Plaintiff's Proposed Findings of Fact and Conclusions of Law
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1.27.84	Memorandum Opinion and Order
2.03.84	Notice of Appeal to the Supreme Court

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

---

No. 81-803-CIV-5

---

RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

RUFUS L. EDMISTEN, *et al.*

*Defendants.*

---

FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

---

ORDER

For the reasons set forth in the Memorandum Opinion of the court filed this day;

It is ADJUDGED and ORDERED that:

1. Chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982 (1982 redistricting plan) are declared to violate section 2 of the Voting rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973, by the creation of the following legislative districts: Senate Districts Nos. 2 and 22, and House of Representatives Districts Nos. 8, 21, 23, 36, and 39.

2. Pending further orders of this court, the defendants, their agents and employees, are enjoined from conducting any primary or general elections to elect members of the State Senate or State House of Representatives to represent, *inter*

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*alia*, registered black voters resident in any of the areas now included within the legislative districts identified in paragraph 1. of this Order, whether pursuant to the 1982 redistricting plan, or any revised or new plan.

This Order does not purport to enjoin the conduct of any other primary or general elections that the State of North Carolina may see fit to conduct to elect members of the Senate or House of Representatives under the 1982 redistricting plan, or to elect candidates for any other offices than those of the State Senate and House of Representatives. See N.C.G.S. 120-2.1 (1983) Cum. Supp.).

3. Jurisdiction of this court is retained to entertain the submission of a revised legislative districting plan by the defendants, or to enter a further remedial decree, in accordance with the Memorandum Opinion filed today in this action.

4. The award of costs and attorneys fees as prayed by plaintiffs is deferred pending entry of a final judgment, or such earlier date as may be shown required in the interests of justice.

---

J. Dickson Phillips, Jr.  
United States Circuit Judge

---

W. Earl Britt, Jr.  
Chief United States District Judge

---

Franklin T. Dupree, Jr.  
Senior United States District Judge

I certify the foregoing to be a true and correct copy of the Order.

J. Rich Leonard, Clerk  
United States District Court  
Eastern District of North Carolina

By Cherlyn Wells  
Deputy Clerk

JA-5

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

---

No. 81-803-CIV-5

---

RALPH GINGLES, *et al.*

*Plaintiffs,*

vs.

RUFUS L. EDMISTEN, *et al.*

*Defendants.*

---

FILED

JAN 27 1984

J. RICH LEONARD, CLERK  
U.S. DISTRICT COURT  
E. DIST. NO. CAR.

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MEMORANDUM OPINION

Before PHILLIPS, Circuit Judge, BRITT, Chief District Judge, and DUPREE, Senior District Judge.

PHILLIPS Circuit Judge:

In this action Ralph Gingles and others, individually and as representatives of a class composed of all the black citizens of North Carolina who are registered to vote, challenge on constitutional and statutory grounds the redistricting<sup>1</sup> plan

---

<sup>1</sup> For consistency and convenience we use the term "redistricting" throughout as a more technically, as well as descriptively, accurate one than the terms "apportionment" or "reapportionment" sometimes used by the parties herein to refer to the specific legislative action under challenge here. See *Carstens v. Lamm*, 543 F. Supp. 68, 72 n.3 (D. Col. 1982).

enacted in final form in 1982 by the General Assembly of North Carolina for the election of members of the Senate and House of Representatives of that state's bicameral legislature. Jurisdiction of this three-judge district court is based on 28 U.S.C. §§ 1331, 1343, and 2284 (three judge court) and on 42 U.S.C. § 1973c.

The gravamen of plaintiffs' claim is that the plan makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts, and that in another area of the state the plan fractures into separate voting minorities a comparable concentration of black voters, all in a manner that violates rights of the plaintiffs secured by section 2 of the Voting Rights Act of 1965, amended June 29, 1982, 42 U.S.C. § 1973 (Section 2, or Section 2 of the Voting Rights Act), 42 U.S.C. §§ 1981 and 1983, and the thirteenth, fourteenth and fifteenth amendments to the United States Constitution.<sup>2</sup> In particular, the claim is that the General Assembly's plan impermissibly dilutes the voting strength of the state's registered black voters by submerging black voting minorities in multi-member House District No. 36 (8 members - Mecklenburg County), multi-member House District No. 39 (5 members - part of Forsyth County), multi-member House District No. 23 (3 members - Durham County), multi-member House District No. 21 (6 members - Wake County), multi-member House District No. 8 (4 members - Wilson, Edgecombe and Nash Counties), and multi-member Senate District No. 22 (4 members - Mecklenburg and Cabarrus Counties), and by fracturing between more than one senate district in the northeastern section of the state a concentration of black voters sufficient in numbers and con-

<sup>2</sup> The original complaint also included challenges to population deviations in the redistricting plan allegedly violative of one-person-one-vote principles, and to congressional redistricting plans being contemporaneously enacted by the state's General Assembly. Both of these challenges were dropped by amended or supplemental pleadings responsive to the evolving course of legislative action, leaving only the state legislature "vote dilution" claims for resolution.

tiguity to constitute a voting majority in at least one single-member district, with the consequence, as intended, that in none of the senate districts into which the concentration is fractured (most notably, Senate District 2 with the largest mass of the concentration) is there an effective voting majority of black citizens.

We conclude on the basis of our factual findings that the redistricting plan violates Section 2 of the Voting Rights Act in all the respects challenged, and that plaintiffs are therefore entitled to appropriate relief, including an order enjoining defendants from conducting elections under the extant plan. Because we uphold plaintiffs' claim for relief under Section 2 of the Voting Rights Act, we do not address their other statutory and constitutional claims seeking the same relief.

## I

### General Background and Procedural History

In July of 1981, responding to its legal obligation to make any redistrictings compelled by the 1980 decennial census, the North Carolina General Assembly enacted a legislative redistricting plan for the state's House of Representatives and Senate. This original 1981 plan used a combination of multi-member and single-member districts across the state, with multi-member districts predominating; had no district in which blacks constituted a registered voter majority and only one with a black population majority; and had a range of maximum population deviations from the equal protection ideal of more than 20%. Each of the districts was composed of one or more whole counties, a result then mandated by state constitutional provisions adopted in 1968 by amendments that prohibited the division of counties in legislative districting. At the time this original redistricting plan was enacted (and at all critical times in this litigation) forty of North Carolina's one hundred counties were covered by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Section 5, or Section 5 of the Voting Rights Act.).



Plaintiffs filed this action on September 16, 1981, challenging that original redistricting plan for, *inter alia*, its population deviations, its submergence of black voter concentrations in some of the multi-member districts, and the failure of the state to obtain preclearance, pursuant to Section 5, of the 1968 constitutional amendments prohibiting county division in legislative districting.

After this action had been filed, the state submitted the 1968 no-division-of-counties constitutional provisions for original Section 5 preclearance by the Attorney General of the United States. While action on that submission was pending, the General Assembly convened again in special session and in October 1981 repealed the original districting plan for the state House of Representatives and enacted another. This new plan reduced the range of maximum population deviations to approximately 16%, retained a preponderance of multi-member districts across the state, and again divided no counties. No revision of the extant Senate districting plan was made.

In November 1981, the Attorney General interposed formal objection, under Section 5, to the no-division-of-counties constitutional provisions so far as they affected covered counties. Objection was based on the Attorney General's expressed view that the use of whole counties in legislative districting required the use of large multi-member districts and that this "necessarily submerges cognizable minority population concentrations into larger white electorates." Following this objection to the constitutional provisions, the Attorney General further objected, on December 7, 1981, and January 20, 1982, to the then extant redistricting plans for both the Senate and House as they affected covered counties.

In February 1982, the General Assembly again convened in extra session and on February 11, 1982, enacted for both the Senate and House revised redistricting plans which divided some counties both in areas covered and areas not covered by Section 5. Again, on April 19, 1982, the Attorney General interposed objections to the revised districting plans for both

the Senate and House. The letter interposing objection acknowledged some improvement of black voters' situation by reason of county division in Section 5 covered areas, but found the improvements insufficient to permit preclearance. The General Assembly once more reconvened in a second extra session on April 26, 1982, and on April 27, 1982, enacted a further revised plan which again divided counties both in areas covered and areas not covered by Section 5. That plan, embodied in chapters 1 and 2 of the North Carolina Session Laws of the Second Extra Session of 1982, received Section 5 preclearance on April 30, 1982. As precleared under Section 5, the plan constitutes the extant legislative districting law of the state, and is the subject of plaintiffs' ultimate challenge by amended and supplemented complaint in this action.<sup>3</sup>

During the course of the legislative proceedings above summarized, this action proceeded through its pre-trial stages.<sup>4</sup> Amended and supplemental pleadings accommodating to successive revisions of the originally challenged redistricting plan were allowed. Extensive discovery and motion practice was had; extensive stipulations of fact were made and embodied in pretrial orders. The presently composed three-

<sup>3</sup> The final plan's division of counties in areas of the state not covered by Section 5 was challenged by voters in one such county on the basis that the division violated the state's 1968 constitutional prohibition. The claim was that in non-covered counties of the state the constitutional prohibition remained in force, notwithstanding its suspension in covered counties by virtue of the Attorney General's objection. In *Cavanagh v. Brock*, No. 82-545-CIV-5 (E.D.N.C. Sept. 22, 1983), which at one time was consolidated with the instant action, this court rejected that challenge, holding that as a matter of state law the constitutional provisions were not severable, so that their effective partial suspension under federal law resulted in their complete suspension throughout the state.

<sup>4</sup> At one stage in these proceedings another action challenging the redistricting plan for impermissible dilution of the voting strength of black voters was consolidated with the instant action. In *Pugh v. Hunt*, No. 81-1066-CIV-5, also decided this day, we earlier entered an order of the deconsolidation and permitted the black plaintiffs in that action to intervene as individual and representative plaintiffs in the instant action.

judge court was designated by Chief Judge Harrison L. Winter of the United States Court of Appeals for the Fourth Circuit on October 16, 1981. The action was designated a plaintiff class action by stipulation of the parties on April 2, 1982. Following enactment and Section 5 preclearance of the April 27, 1982, Senate and House districting plans, the pleadings were closed, with issue joined for trial on plaintiffs' challenge, by amended and supplemented complaint, to that finally adopted plan.

Following a final pre-trial conference on July 14, 1983, trial to the three-judge court was held from July 25, 1983, through August 3, 1983. Extensive oral and documentary evidence was received. Decision was deferred pending the submission by both parties of proposed findings of fact and conclusions of law, briefing and oral argument. Concluding oral arguments of counsel were heard by the court on October 14, 1983, and a limited submission of supplemental documentary evidence by both parties was permitted on December 5, 1983.

Having considered the evidence, the memoranda of law submitted by the parties, the stipulations of fact, and the oral arguments of counsel, the court, pursuant to Fed.R.Civ.P. 52(a), enters the following findings of fact and conclusions of law, prefaced with a discussion of amended Section 2 of the Voting Rights Act and of certain special problems concerning the proper interpretation and application of that section to the evidence in this case.

## II

### Amended Section 2 Of The Voting Rights Act

From the outset of this action plaintiffs have based their claim of racial vote dilution not only on the fourteenth and fifteenth amendments, but on Section 2 of the Voting Rights Act. As interpreted by the Supreme Court at the time this action was commenced, former Section 2,<sup>5</sup> secured no further

<sup>5</sup> Former Section 2, enacted pursuant to Congress's constitutional enforcement powers, provided simply:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political (footnote continued on next page)

voting rights than were directly secured by those constitutional provisions. To the extent "vote dilution" claims lay under either of the constitutional provisions or Section 2,<sup>6</sup> the requirements for proving such a claim were the same: there must have been proven both a discriminatorily "dilutive" effect traceable in some measure to a challenged electoral mechanism and, behind that effect, a specific intent on the part of responsible state officials that the mechanism should have had the effect. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

While this action was pending for trial and after the ultimately challenged redistricting plan had been enacted and given Section 5 preclearance, Congress amended Section 2<sup>7</sup> in drastic and, for this litigation, critically important respects. In rough summary, the amended version liberalized the statutory vote dilution claim in two fundamental ways. It removed any necessity that discriminatory intent be proven, leaving only the necessity to show dilutive effect traceable to a challenged electoral mechanism; and it made explicit that the dilutive effect might be found in the "totality of the circumstances" within which the challenged mechanism operated and not alone in direct operation of the mechanism.

(footnote continued from previous page)

subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1976).

<sup>6</sup> It is not now perfectly clear—but neither is it of direct consequence here—whether a majority of the Supreme Court considers that a racial vote dilution claim, as well as a direct vote denial claim, lies under the fifteenth amendment and, in consequence, lay under former Section 2. See *Rogers v. Lodge*, 458 U.S. 613, 619 n.16 (1982). It is well settled, however, that such claims lie under the fourteenth amendment, though only upon proof of intent as well as effect. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>7</sup> H.R. 3112, amending Section 2 and extending the Voting Rights Act of 1965, was passed by the House on October 15, 1981. On June 18, 1982, the Senate adopted a different version, S. 992, reported out of its Committee on the Judiciary. The House unanimously adopted the Senate bill on June 23, 1982, and it was signed into law by the President on June 29, 1982. There was no intervening conference committee action.



Following Section 2's amendment, plaintiffs amended their complaint in this action to invoke directly the much more favorable provisions of the amended statute. All further proceedings in the case have been conducted on our perception that the vote dilution claim would succeed or fail under amended Section 2 as now the obviously most favorable basis of claim.<sup>8</sup>

Because of the amended statute's profound reworking of applicable law and because of the absence of any authoritative Supreme Court decisions interpreting it,<sup>9</sup> we preface our findings and conclusions with a summary discussion of the amended statute and of our understanding of its proper application to the evidence in this case. Because we find it dispositive of the vote dilution claim, we may properly rest decision on the amended statute alone and thereby avoid addressing the still subsisting constitutional claims seeking the same relief. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

<sup>8</sup> Of course, the direct claims under the fourteenth (and possibly the fifteenth) amendment remain, and could be established under *Bolden* by proof of a dilutive effect intentionally inflicted. But no authoritative decision has suggested that proof alone of an unrealized discriminatory intent to dilute would suffice. A dilutive effect remains an essential element of constitutional as well as Section 2 claims. See Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. W.L. Rev. 689, 737-38 n.318 (1982). Neither is there any suggestion that the remedy for an unconstitutional intentional dilution should be any more favorable than the remedy for a Section 2 "results" violation. Whether the evidence of discriminatory intent might nevertheless have limited relevance in establishing a Section 2 "result" claim is another matter.

<sup>9</sup> There have, however, been a few lower federal court decisions interpreting and applying amended Section 2 to state and local electoral plans. All generally support the interpretation we give the statute in the ensuing discussion. See *Major v. Treen*, Civil Action No. 82-1192 Section C (E.D. La. Sept. 23, 1983) (three-judge court); *Rybicki v. State Board of Elections*, No. 81-C-6030 (N.D. Ill. Jan. 20, 1983) (three-judge court); *Thomasville Branch of NAACP v. Thomas County*, Civil Action No. 75-34-THOM (M.D. Ga. Jan. 26, 1983); *Jones v. City of Lubbock*, Civil Action No. CA-5-76-34 (N.D. Tex. Jan. 20, 1983); *Taylor v. Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982) (on grant of preliminary injunction).

Section 2, as amended, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Without attempting here a detailed analysis of the legislative history leading to enactment of amended Section 2, we deduce from that history and from the judicial sources upon which Congress expressly relied in formulating the statute's text the following salient points which have guided our application of the statute of the facts we have found.

*First.* The fundamental purpose of the amendment to Section 2 was to remove intent as a necessary element of racial vote dilution claims brought under the statute.<sup>10</sup>

<sup>10</sup> Senator Dole, sponsor of the compromise Senate version ultimately enacted as Section 2, stated that one of his "key objectives" in offering it was to

make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory "results", in which case proof of discriminatory intent or purpose would be neither required, nor relevant. I was convinced of the inappropriateness of an "intent standard" (footnote continued on next page)



This was accomplished by codifying in the amended statute the racial vote dilution principles applied by the Supreme Court in its pre-*Bolden* decision in *White v. Regester*, 412 U.S. 755 (1973). That decision, as assumed by the Congress,<sup>11</sup> required no more to establish the illegality of a state's electoral mechanism than proof that its "result," irrespective of intent, when assessed in "the totality of circumstances" was "to cancel out or minimize the voting strength of racial groups," *Id.* at 765 - in that case by submerging racial minority voter concentrations in state multi-member legislative districts. The *White v. Regester* racial vote dilution principles, as assumed by the Congress, were made explicit in new subsection (b) of Section 2 in the provision that such a "result," hence a violation of secured voting rights, could be established by proof "based on the totality of circumstances . . . that the political processes leading to nomination or election . . . are not equally open to participation" by members of protected minorities. *Cf. id.* at 766.

*Second.* In determining whether, "based on the totality of circumstances," a state's electoral mechanism does so "result" in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in *White v. Regester* and sub-

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as the sole means of establishing a voting rights claim, as were the majority of my colleagues on the Committee.

S. Rep. No. 417, 97th Cong., 2d Sess. 193 (1982) (additional views of Sen. Dole) (hereinafter S. Rep. No. 97-417).

<sup>11</sup> Congressional opponents of amended Section 2 contended in debate that *White v. Regester* did not actually apply a "results only" test, but that, properly interpreted, it required, and by implication found, intent also proven. The right or wrong of that debate is essentially beside the point for our purposes. We seek only Congressional intent, which clearly was to adopt a "results only" standard by codifying a decision unmistakably assumed—whether or not erroneously—to have embodied that standard. See Hartman, *Racial Vote Dilution*, *supra* note 8, at 725-26 & n.236.

sequently elaborated by the former Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). These typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the more relevant ones, in some cases other factors will be indicative of the alleged dilution.

S. Rep. No. 97-417, *supra* note 10, at 28-29 (footnotes omitted).

*Third.* Congress also intended that amended Section 2 should be interpreted and applied in conformity with the general body of pre-*Bolden* racial vote dilution jurisprudence that applied the *White v. Regester* test for the existence of a dilutive "result."<sup>12</sup>

Critical in that body of jurisprudence are the following principles that we consider embodied in the statute.

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively, see *United Jewish Organization v. Carey*, 430 U.S. 144, 166 n.24 (1977), give it in a voting constituency not racially polarized in its voting behavior. See *Nevett v. Sides*, 571 F.2d 209, 223 & n.16 (5th Cir. 1978). Vote dilution in this sense can exist notwithstanding the relative absence of structural barriers to exercise of the electoral franchise. It can be enhanced by other factors - cultural, political, social, economic - in which the racial minority is relatively disadvantaged and which further operate to diminish practical political effectiveness. *Zimmer v. McKeithen*, *supra*. But the demonstrable unwillingness of substantial numbers of the ra-

<sup>12</sup> See S. Rep. No. 97-417, *supra* note 10, at 32 ("[T]he legislative intent [is] to incorporate [*White v. Regester*] and extensive case law . . . which developed around it."). See also *id.* at 19-23 (*Bolden* characterized as "a marked departure from [the] prior law" of vote dilution as applied in *White v. Regester*, *Zimmer v. McKeithen*, and a number of other cited federal decisions following *White v. Regester*).

cial majority to vote for any minority race candidate or any candidate identified with minority race interests is the linchpin of vote dilution by districting. *Nevett v. Sides*, *supra*; see also *Rogers v. Lodge*, 458 U.S. 613, 623 (1981) (emphasizing centrality of bloc voting as evidence of purposeful discrimination).

The mere fact that blacks constitute a voting or population minority in a multi-member district does not alone establish that vote dilution has resulted from the districting plan. See *Zimmer*, 485 F.2d at 1304 ("axiomatic" that at-large and multi-member districts are not *per se* unconstitutional). Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population. *Id.* at 1305.<sup>13</sup>

On the other hand, proof that blacks constitute a population majority in an electoral district does not *per se* establish that no vote dilution results from the districting plan, at least where the blacks are a registered voter minority. *Id.* at 1303. Nor does proof that in a challenged district blacks have recently been elected to office. *Id.* at 1307.

Vote dilution in the *White v. Regester* sense may result from the fracturing into several single-member districts as well as from the submergence in one multi-member district of black voter concentrations sufficient, if not "fractured" or "submerged," to constitute an effective single-member district voting majority. See *Nevett v. Sides*, 571 F.2d 209, 219 (5th Cir. 1978).

*Fourth.* Amended Section 2 embodies a congressional purpose to remove all vestiges of minority race vote dilution perpetuated on or after the amendment's effective date by state or local electoral mechanisms.<sup>14</sup> To accomplish this, Con-

<sup>13</sup> This we consider to be the limit of the intended meaning of the disclaimer in amended Section 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

<sup>14</sup> Both the Senate and House Committee Reports assert a purpose to forestall further purposeful discrimination that might evade remedy under (footnote continued on next page)



gress has exercised its enforcement powers under section 5 of the fourteenth and section 2 of the fifteenth amendments<sup>15</sup> to create a new judicial remedy by private action that is broader in scope than were existing private rights of action for constitutional violations of minority race voting rights. Specifically, this remedy is designed to provide a means for bringing states and local governments into compliance with constitutional guarantees of equal voting rights for racial minorities without the necessity to prove an intentional violation of those rights.<sup>16</sup>

*Fifth.* In enacting amended Section 2, Congress made a deliberate political judgment that the time had come to apply

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the stringent intent-plus-effects test of *Bolden* and to eradicate existing or new mechanisms that perpetuate the effects of past discrimination. See S. Rep. 97-417, *supra* note 10, at 40; H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981) (hereinafter H.R. Rep. No. 97-227).

We accept—and it is not challenged in this action by the state defendants—that Congress intended the amendment to apply to litigation pending upon its effective date. See *Major v. Treen*, *supra*, slip op. at 40-41 n.20.

<sup>15</sup> Both the Senate and House Committee Reports express an intention that amended Section 2 be regarded as remedial rather than merely redefinitional of existing constitutional voting rights. See S. Rep. No. 97-417, *supra* note 10, at 39-43; H.R. Rep. No. 97-227, *supra* note 14, at 31.

<sup>16</sup> Congressional proponents of amended Section 2 were at pains in debate and committee reports to disclaim any intention or power by Congress to overrule the Supreme Court's constitutional interpretation in *Bolden* only that the relevant constitutional provisions prohibited intentional racial vote dilution, and to assert instead a power comparable to that exercised in the enactment of Section 5 of the Voting Rights Act to provide a judicial remedy for enforcement of the state's affirmative obligations to come into compliance. See, e.g., S. Rep. 97-417, *supra* note 10, at 41 ("Congress cannot alter the judicial interpretations in *Bolden* . . . [T]he proposal is a proper statutory exercise of Congress' enforcement power. . . .").

No challenge is made in this action to the constitutionality of Section 2 as a valid exercise of Congress's enforcement powers under the fourteenth (and possibly fifteenth) amendment, and we assume constitutionality on that basis. See *Major v. Treen*, *supra*, slip op. 44-61 (upholding constitutionality against direct attack).

the statute's remedial measures to *present conditions* of racial vote dilution that might be established in particular litigation; that national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes, or by voluntary action of state and local governments, or by judicial remedies limited to proof of intentional racial discrimination. See, e.g., S. Rep. 97-417, *supra* note 10, at 193 (additional view of Senator Dole) (asserting purpose to eradicate "racial discrimination which . . . still exists in the American electoral process").

In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority;<sup>17</sup> the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior;<sup>18</sup> the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building;<sup>19</sup> and the

<sup>17</sup> See *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 542-46 (Feb. 1, 1982) (hereafter *Senate Hearings*) (prepared statement of Professor McManus, pointing to disagreements within black community leadership over relative virtues of local districting plans).

<sup>18</sup> See *Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess., *Voting Rights Act*, Report on S. 1992, at 42-43 (Comm. Print 1982) (hereafter *Subcommittee Report*), reprinted in S. Rep. No. 97-417, *supra* note 10, 107, 149 (asserting "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials"); *Subcommittee Report*, *supra*, at 45, reprinted in S. Rep. No. 97-417, *supra* note 10, at 150 (asserting that amended Section 2 would aggravate segregated housing patterns by encouraging blacks to remain in safe black legislative districts).

<sup>19</sup> See *Subcommittee Report*, *supra* note 18, at 43-44, reprinted in S. Rep. No. 97-417, *supra* note 10, at 149-50.



fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.<sup>20</sup>

For courts applying Section 2, the significance of Congress's general rejection or assumption of these risks as a matter of political judgment is that they are not among the circumstances to be considered in determining whether a challenged electoral mechanism presently "results" in racial vote dilution, either as a new or perpetuated condition. If it does, the remedy follows, all risks to these values having been assessed and accepted by Congress. It is therefore irrelevant for courts applying amended Section 2 to speculate or to attempt to make findings as to whether a presently existing condition of racial vote dilution is likely in due course to be removed by normal political processes, or by affirmative acts of the affected government, or that some elements of the racial minority prefer to rely upon those processes rather than having the judicial remedy invoked.

### III

#### Findings of Fact

##### A.

#### The Challenged Districts

The redistricting plans for the North Carolina Senate and House of Representatives enacted by the General Assembly of North Carolina in April of 1982 included six multi-member districts and one single-member district that are the subjects of the racial vote dilution challenge in this action.

<sup>20</sup> See *Senate Hearings*, *supra*, note 17, at 1351-54 (Feb. 12, 1982) (prepared statement of Professor Blumstein); *id.* at 509-10 (Jan. 28, 1982) (prepared statement of Professor Elier), *reprinted in* S. Rep. No. 97-417, *supra* note 10, at 147; *id.* at 231 (Jan. 27, 1982) (testimony of Professor Berns), *reprinted in* S. Rep. No. 97-417, *supra* note 10, at 147.

The multi-member districts, each of which continued pre-existing districts and apportionments, are as follows, with their compositions, and their apportionments of members and the percentage of their total populations and of their registered voters that are black:

District	% of Population that is Black	% of Registered Voters that is Black (as of 10/4/82)
Senate No. 22 (Mecklenburg and Cabarrus Counties (4 members))	24.3	16.8
House No. 36 (Mecklenburg County) (8 members)	26.5	18.0
House No. 39 (Part of Forsyth County) (5 members)	25.1	20.8
House No. 23 (Durham County) (3 members)	36.3	28.6
House No. 21 (Wake County) (6 members)	21.8	15.1
House No. 8 (Wilson, Nash and Edgecombe Counties) (4 members)	39.5	29.5

As these districts are constituted, black citizens make up distinct population and registered-voter minorities in each.

Of these districts, only House District No. 8 is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration. For example, concentrations of black citizens em-

braced within the following single-member districts, as depicted on exhibits before the court, would meet those criteria:

<i>Multi-Member District</i>	<i>Single-Member District: location and racial composition</i>	<i>Exhibit</i>
Senate No. 22 (Mecklenburg/Cabarrus Counties)	Part of Mecklenburg County; 70.0% Black	Pl. Ex. 9
House No. 36 (Mecklenburg County)	(1) Part of Mecklenburg County; 66.1% Black	Pl. Ex. 4
	(2) Part of Mecklenburg County; 71.2% Black	Pl. Ex. 4
House No. 39 (Part of Forsyth County)	Part of Forsyth County; 70.0% Black	Pl. Ex. 5
House No. 23 (Durham County)	Part of Durham County; 70.9% Black	Pl. Ex. 6 substitute
House No. 21 (Wake County)	Part of Wake County; 67.0% Black	Pl. Ex. 7
House No. 8 (Wilson, Edgecombe, Nash Counties)	Parts of Wilson, Edgecombe and Nash Counties; 62.7% Black	Pl. Ex. 8

The single-member district is Senate District No. 2 in the rural northeastern section of the state. It was formed by extensive realignment of existing districts to encompass an area which formerly supplied components of two multi-member Senate districts (No. 1 of 2 members; No. 6 of 2 members). It consists of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax and Edgecombe Counties. Black citizens made up 55.1% of the total population of the district, and 46.2% of the population that is registered to vote. This does not constitute them an effective voting majority in this district.<sup>21</sup>

<sup>21</sup> We need not attempt at this point to define the exact population level at which blacks would constitute an effective (non-diluted) voting majority, either generally or in this area. Defendant's expert witness testified that a general "rule of thumb" for insuring an effective voting majority is 65%. This

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This district is in an area of the state covered by § 5 of the Voting Rights Act.

At the time of creation of this single-member district, there was a concentration of black citizens within the boundaries of this district and those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district, which single-member district would satisfy all constitutional requirements of population and geographical configuration. For example, a concentration of black voters embraced within a district depicted on Plaintiff's Exhibit 10(a) could minimally meet these criteria, though a still larger concentration might prove necessary to make the majority a truly effective one, depending upon experience in the new district alignments. In such a district, black citizens would constitute 60.7% of the total population and 51.02% of the registered voters (as contrasted with percentages of 55.1% and 46.2%, respectively, in challenged Senate District 2).

## B

### Circumstances Relevant To The Claim Of Racial Vote Dilution: The "Zimmer Factors"

At the time the challenged districting plan was enacted in 1982, the following circumstances affected the plan's effect

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is the percentage used as a "benchmark" by the Justice Department in administering § 5. Plaintiffs' expert witness opined that a 60% population majority in the area of this district could only be considered a "competitive" one rather than a "safe" one.

On the uncontradicted evidence adduced we find—and need only find for present purposes—that the extant 55.1% black population majority does not constitute an effective voting majority, i.e., does not establish *per se* the absence of racial vote dilution, in this district. See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 150 (5th Cir. 1977) ("Where . . . cohesive black voting strength is fragmented among districts, . . . the presence of districts with bare population majorities not only does not necessarily preclude dilution but . . . may actually enhance the possibility of continued minority political impotence.").



upon the voting strength of black voters of the state (the plaintiff class), and particularly those in the areas of the challenged districts.

#### A History Of Official Discrimination Against Black Citizens In Voting Matters

Following the emancipation of blacks from slavery and the period of post-war Reconstruction, the State of North Carolina had officially and effectively discriminated against black citizens in matters touching their exercise of the voting franchise for a period of around seventy years, roughly two generations, from ca. 1900 to ca. 1970. The history of black citizens' attempts since the Reconstruction era to participate effectively in the political process and the white majority's resistance to those efforts is a bitter one, fraught with racial animosities that linger in diminished but still evident form to the present and that remain centered upon the voting strength of black citizens as an identified group.

From 1868 to 1875, black citizens, newly emancipated and given the legal right to vote, effectively exercised the franchise, in coalition with white Republicans, to control the state legislature. In 1875, the Democratic Party, overwhelmingly white in composition, regained control of state government and began deliberate efforts to reduce participation by black citizens in the political processes. These efforts were not immediately and wholly successful and black male citizens continued to vote and to hold elective office for the remainder of the nineteenth century.

This continued participation by black males in the political process was furthered by Fusionists' (Populist and Republican coalition) assumption of control of the state legislature in 1894. For a brief season, this resulted in legislation favorable to black citizens' political participation as well as their economic advancement.

The Fusionists' legislative program favorable to blacks impelled the white-dominated Democratic Party to undertake an

overt white supremacy political campaign to destroy the Fusionist coalition by arousing white fears of Negro rule. This campaign, characterized by blatant racist appeals by pamphlet and cartoon, aided by acts of outright intimidation, succeeded in restoring the Democratic Party to control of the legislature in 1898. The 1898 legislature then adopted constitutional amendments specifically designed to disenfranchise black voters by imposing a poll tax and a literacy test for voting with a grandfather clause for the literacy test whose effect was to limit the disenfranchising effect to blacks. The amendments were adopted by the voters of the state, following a comparable white supremacy campaign, in 1900. The 1900 official literacy test continued to be freely applied for 60 years in a variety of forms that effectively disenfranchised most blacks. In 1961, the North Carolina Supreme Court declared unconstitutional the practice of requiring a registrant to write the North Carolina Constitution from dictation, but upheld the practice of requiring a registrant "of uncertain ability" to read and copy in writing the state Constitution. *Bazemore v. Bertie County Board of Elections*, 254 N.C. 398 (1961). At least until around 1970, the practice of requiring black citizens to read and write the Constitution in order to vote was continued in some areas of the state. Not until around 1970 did the State Board of Elections officially direct cessation of the administration of any form of literacy test.

Other official voting mechanisms designed to minimize or cancel the potential voting strength of black citizens were also employed by the state during this period. In 1955, an anti-single shot voting law applicable to specified municipalities and counties was enacted. It was enforced, with the intended effect of fragmenting a black minority's total vote between two or more candidates in a multi-seat election and preventing its concentration on one candidate, until declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). In 1967, a numbered-seat plan for election in multi-member legislative districts was enacted. Its effect was, as intended, to prevent single-shot voting in multi-member legislative dis-



tricts. It was applied until declared unconstitutional in the *Dunston* case, *supra*, in 1972.

In direct consequence of the poll tax and the literacy test, black citizens in much larger percentages of their total numbers than the comparable percentages of white citizens were either directly denied registration or chilled from making the attempt from the time of imposition of these devices until their removal. After their removal as direct barriers to registration, their chilling effect on two or more generations of black citizens has persisted to the present as at least one cause of continued relatively depressed levels of black voter registration. Between 1930 and 1948 the percentage of black citizens who successfully sought to register under the poll tax and literacy tests increased from zero to 15%. During this eighteen-year period that only ended after World War II, no black was elected to public office in the state. In 1960, twelve years later, after the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), only 39.1% of the black voting age population was registered to vote, compared to 92.1% of age-qualified whites. By 1971, following the civil rights movement, 44.4% of age-qualified blacks were registered compared to 60.6% of whites. This general range of statewide disparity continued into 1980, when 51.3% of age-qualified blacks and 70.1% of whites were registered, and into 1982 when 52.7% of age-qualified blacks and 66.7% of whites were registered.<sup>22</sup>

<sup>22</sup> The recent history of white and black voter registration statewide and in the areas of the challenged districts is shown on the following chart.

	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Whole State	61.7	43.7	70.1	51.3	66.7	52.7
Mecklenburg	71.3	40.8	73.8	48.4	73.0	50.8
Forsyth	65.8	58.7	76.3	67.7	69.4	64.1
Durham	63.0	39.4	70.7	45.8	66.0	52.9
Wake	61.2	37.5	76.0	48.9	72.2	49.7
Wilson	60.9	36.3	66.9	40.9	64.2	48.0

(footnote continued on next page)

Under the present Governor's administration an intelligent and determined effort is being made by the State Board of Elections to increase the percentages of both white and black voter registrations, with special emphasis being placed upon increasing the levels of registration in groups, including blacks, in which those levels have traditionally been depressed relative to the total voting age population. This good faith effort by the currently responsible state agency, directly reversing official state policies which persisted for more than seventy years into this century, is demonstrably now producing some of its intended results. If continued on a sustained basis over a sufficient period, the effort might succeed in removing the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens. But at the present time the gap has not been closed, and there is of course no guarantee that the effort will be continued past the end of the present state administration.

The present condition - which we assess - is that, on a statewide basis, black voter registration remains depressed relative to that of the white majority, in part at least because of the long period of official state denial and chilling of black

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	Percent of Voting Age Population Registered to Vote					
	10/78		10/80		10/82	
	White	Black	White	Black	White	Black
Edgecombe	63.8	37.9	68.2	50.4	62.7	53.1
Nash	61.2	39.0	72.0	41.2	64.2	43.0
Bertie	75.6	46.0	77.0	54.1	74.6	60.0
Chowan	71.3	44.3	77.4	53.9	74.1	54.0
Gates	80.9	73.5	83.9	77.8	83.6	82.3
Halifax	66.8	40.9	72.0	50.0	67.3	55.3
Hertford	75.6	56.6	81.8	62.5	68.7	58.3
Martin	69.3	49.7	76.9	55.3	71.2	53.3
Northampton	72.4	58.5	77.0	63.9	82.1	73.9
Washington	74.3	62.8	82.2	66.0	75.6	67.4

citizens' registration efforts. This statewide depression of black voter registration levels is generally replicated in the areas of the challenged districts, and in each is traceable in part at least to the historical statewide pattern of official discrimination here found to have existed.

#### Effects Of Racial Discrimination In Facilities, Education, Employment, Housing And Health

In consequence of a long history, only recently alleviated to some degree, of racial discrimination in public and private facility uses, education, employment, housing and health care, black registered voters of the state remain hindered, relative to the white majority, in their ability to participate effectively in the political process.

At the start of this century, *de jure* segregation of the races in practically all areas of their common life existed in North Carolina. This condition continued essentially unbroken for another sixty-odd years, through both World Wars and the Korean conflict, and through the 1950's. During this period, in addition to prohibiting inter-racial marriages, state statutes provided for segregation of the races in fraternal orders and societies; the seating and waiting rooms of railroads and other common carriers; cemeteries; prisons, jails and juvenile detention centers; institutions for the blind, deaf and mentally ill; public and some private toilets; schools and school districts; orphanages; colleges; and library reading rooms. With the exception of those laws relating to schools and colleges, most of these statutes were not repealed until after passage of the federal Civil Rights Act of 1964, some as late as 1973.

Public schools in North Carolina were officially segregated by race until 1954 when *Brown v. Board of Education* was decided. During the long period of *de jure* segregation, the black schools were consistently less well funded and were qualitatively inferior. Following the *Brown* decision, the public schools remained substantially segregated for yet another fifteen years on a *de facto* basis, in part at least because of various practical impediments erected by the state to judicial

enforcement of the constitutional right to desegregated public education recognized in *Brown*. As late as 1960, only 226 black students throughout the entire state attended formerly all-white public schools. Until the end of the 1960's, practically all the state's public schools remained almost all white or almost all black. Substantial desegregation of the public schools only began to take place around a decade ago, following the Supreme Court's decision in *Swann v. Mecklenburg County Board of Education*, 402 U.S. 1 (1971). In the interval since, "white-flight" patterns in some areas of the state have prevented or reversed developing patterns or desegregation of the schools. In consequence, substantial pockets of *de facto* segregation of the races in public school education have arisen or have continued to exist to this time though without the great disparities in public funding and other support that characterized *de jure* segregation of the schools.

Because significant desegregation of the public schools only commenced in the early 1970's, most of the black citizens of the state who were educated in this state and who are over 30 years of age attended qualitatively inferior racially segregated public schools for all or most of their primary and secondary education. The first group of black citizens who have attended integrated public schools throughout their educational careers are just now reaching voting age. In at least partial consequence of this segregated pattern of public education and the general inferiority of *de jure* segregated black schools, black citizens of the state who are over 25 year of age are substantially more likely than whites to have completed less than 8 years of education (34.6% of blacks; 22.0% of whites), and are substantially less likely than whites to have had any schooling beyond high school (17.3% of blacks; 29.3% of whites).

Residential housing patterns in North Carolina, as generally in states with histories of *de jure* segregation, have traditionally been separated along racial lines. That pattern persists today in North Carolina generally and in the areas covered by the challenged districts specifically; in the latter, virtually all residential neighborhoods are racially identifiable. Statewide,



black households are twice as likely as white households to be renting rather than purchasing their residences and are substantially more likely to be living in overcrowded housing, substandard housing, or housing with inadequate plumbing.

Black citizens of North Carolina have historically suffered disadvantage relative to white citizens in public and private employment. Though federal employment discrimination laws have, since 1964, led to improvement, the effects of past discrimination against blacks in employment continue at present to contribute to their relative disadvantage. On a statewide basis, generally replicated in the challenged districts in this action, Blacks generally hold lower paying jobs than do whites, and consistently suffer higher incidences of unemployment. In public employment by the state, for example, a higher percentage of black employees than of whites is employed at every salary level below \$12,000 per year and a higher percentage of white employees than black is employed at every level above \$12,000.

At least partially because of this continued disparity in employment opportunities, black citizens are three times as likely as whites to have incomes below the poverty level (30% to 10%); the mean income of black citizens is 64.9% that of white citizens; white families are more than twice as likely as black families to have incomes over \$20,000; and 25.1% of all black families, compared to 7.3% of white families, have no private vehicle available for transportation.

In matters of general health, black citizens of North Carolina are, on available primary indicators, as a group less physically healthy than are white citizens as a group. On a statewide basis, the infant mortality rate (the standard health measure used by sociologists) is approximately twice as high for non-whites (predominately blacks) as for whites. This statewide figure is generally replicated in Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe and Nash Counties (all included within the challenged multi-member districts). Again, on a statewide basis, the death rate is higher for black

citizens than for white, and the life-expectancy of black citizens is shorter than is that of whites.

On all the socio-economic factors treated in the above findings, the status of black citizens as a group is lower than is that of white citizens as a group. This is true statewide, and it is true with respect to every county in each of the districts under challenge in this action. This lower socioeconomic status gives rise to special group interests centered upon those factors. At the same time, it operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests.<sup>23</sup>

#### **Other Voting Procedures That Lessen The Opportunity Of Black Voters To Elect Candidates Of Their Choice**

In addition to the numbered seat requirement and the anti-single shot provisions of state law that were declared unconstitutional in 1972, *see supra* p. 28, North Carolina has, since 1915, had a majority vote requirement which applies to all primary elections, but not to general elections. N.C.G.S. § 163-111.<sup>24</sup>

The general effect of a majority vote requirement is to make it less likely that the candidates of any identifiable voting

<sup>23</sup> Section 2 claimants are not required to demonstrate by direct evidence a causal nexus between their relatively depressed socio-economic status and a lessening of their opportunity to participate effectively in the political process. *See* S. Rep. No. 97-417, *supra* note 10, at 29 n.114. Under incorporated *White v. Regester* jurisprudence, "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977). Independently of any such general presumption incorporated in amended Section 2, we would readily draw the inference from the evidence in this case.

<sup>24</sup> There is no suggestion that when originally enacted in 1915, its purpose was racially discriminatory. That point is irrelevant in assessing its present effect, as a continued mechanism, in the totality of circumstances bearing upon plaintiffs' dilution claim. *See* Part II, *supra*.



minority will finally win elections, given the necessity that they achieve a majority of votes, if not in a first election, then (if called for) in a run-off election. This generally adverse effect on any cohesive voting minority is, of course, enhanced for racial minority groups if, as we find to be the fact in this case, *see infra* pp. 48-58, racial polarization in voting patterns also exists.

While no black candidate for election to the North Carolina General Assembly—either in the challenged districts or elsewhere—has so far lost (or failed to win) an election solely because of the majority vote requirement, the requirement nevertheless exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts to elect candidates of their choice.

The North Carolina majority vote requirement manifestly operates with the general effect noted upon *all* candidates in primary elections. Since 1950, eighteen candidates for the General Assembly who led first primaries with less than a majority of votes have lost run-off elections, as have twelve candidates for other statewide offices, including a black candidate for Lt. Governor and a black candidate for Congress. The requirement therefore necessarily operates as a general, ongoing impediment to any cohesive voting minority's opportunity to elect candidates of its choice in any contested primary, and particularly to any racial minority in a racially-polarized vote setting.<sup>25</sup>

North Carolina does not have a subdistrict residency requirement for members of the Senate and House elected from multi-member districts, a requirement which could to some degree off-set the disadvantage of any voting minority in multi-member districts.<sup>26</sup>

<sup>25</sup> See *White v. Regester*, 412 U.S. 775, 766 (1973).

<sup>26</sup> See *id.* at 766 n.10.

### Use Of Racial Appeals In Political Campaigns

From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns. The appeals have been overt and blatant at some times, more subtle and furtive at others. They have tended to be most overt and blatant in those periods when blacks were openly asserting political and civil rights—during the Reconstruction-Fusion era and during the era of the major civil rights movement in the 1950's and 1960's. During the period from ca. 1900 to ca. 1948 when black citizens of the state were generally quiescent under *de jure* segregation, and when there were few black voters and no black elected officials, racial appeals in political campaigning were simply not relevant and accordingly were not used. With the early stirrings of what became the civil rights movement following World War II, overt racial appeals reappeared in the campaign of some North Carolina candidates. Though by and large less gross and virulent than were those of the outright white supremacy campaigns of 50 years earlier, these renewed racial appeals picked up on the same obvious themes of that earlier time: black domination or influence over "moderate" or "liberal" white candidates and the threat of "negro rule" or "black power" by blacks "bloc voting" for black candidates or black-"dominated" candidates. In recent years, as the civil rights movement, culminating in the Civil Rights Act of 1964, completed the eradication of *de jure* segregation, and as overt expressions of racist attitudes became less socially acceptable, these appeals have become more subtle in form and furtive in their dissemination, but they persist to this time.

The record in this case is replete with specific examples of this general pattern of racial appeals in political campaigns. In addition to the crude cartoons and pamphlets of the outright white supremacy campaigning of the 1890's which featured white political opponents in the company of black political leaders, later examples include various campaign materials,

unmistakably appealing to the same racial fears and prejudices, that were disseminated during some of the most hotly contested statewide campaigns of the state's recent history: the 1950 campaign for the United States Senate; the 1954 campaign for the United States Senate; the 1960 campaign for Governor; the 1968 campaign for Governor; the 1968 Presidential campaign in North Carolina; the 1972 campaign for the United States Senate; and most recently, in the imminent 1984 campaign for the United States Senate.

Numerous other examples of assertedly more subtle forms of "telegraphed" racial appeals in a great number of local and statewide elections, abound in the record. Laying aside the more attenuated forms of arguably racial allusions in some of these, we find that racial appeals in North Carolina political campaigns have for the past thirty years been widespread and persistent.

The contents of these materials reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices on the part of white citizens in regard to black citizens and to black citizens' participation in the political processes of the state. The continued dissemination of these materials throughout this period and down to the present time evidences an informed perception by the persons who have disseminated them that they have had their intended effect to a degree warranting their continued use.

On this basis, we find that the historic use of racial appeals in political campaigns in North Carolina persists to the present time and that its effect is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

#### **The Extent Of Election Of Black Citizens To Public Office**

*Statewide history.* It appears that, with one exception, no black citizen was elected during this century to public office in North Carolina until after World War II. In 1948 and during

the early 1950's a few black citizens were elected to various city councils. Twenty years later, in 1970, there were in the state 62 black elected officials. In 1969 a black citizen was elected to the State House of Representatives for the first time since Reconstruction; in 1975 two blacks were elected, for the first time, to the Senate. From 1970 to 1975 the number of black elected officials increased from 62 to over 200 statewide; in 1982, that number had increased to 255.

At present the number of elected black officials remains quite low in relation to total black population, which is 22.4% of the state total. Black citizens hold 9% of the city council seats (in cities of over 500 population); 7.3% of county commission seats; 4% of sheriff's offices; and 1% of the offices of Clerk of Superior Court. There are 19 black mayors, 13 of whom are in majority black municipalities. Of the black city council members, approximately 40% are from majority black municipalities or election districts. Three black judges have been elected in statewide elections to seats to which they had been appointed by the Governor. Other than these judges, no black has yet been elected during this century to any statewide office or to the Congress of the United States as a representative of this state.

Between 1971 and 1982 there have been, at any given time, between two and four black members of the North Carolina House of Representatives out of a total of 120—between 1.6% and 3.3%. From 1975 to 1983 there have been, at any given time, either one or two black members of the State Senate out of a total of 50—between 2% and 4%. Most recently, in 1982, after this action was filed, 11 black citizens were elected to the State House of Representatives. Six of those 11 were elected from multi-member districts in which blacks constituted a voting minority (including 5 of those challenged); 5 were elected from newly created majority black districts.

Historically, in those multi-member districts where some blacks have succeeded in being elected, overall black candidacies have been significantly less successful than white candida-



cies have been significantly less successful than white candidacies. Black candidates who, between 1970 and 1982, won in Democratic primaries in the six multi-member districts under challenge here were three times as likely to lose in the general election as were their white Democratic counterparts, a fact of statistical significance in assessing the continued effect of race in those elections.

#### **In The Challenged Multi-Member Districts**

##### **House District 36 (Mecklenburg County); Senate District 22 (Mecklenburg/Cabarrus Counties).**

In this century one black citizen has been elected to the State House of Representatives and one black citizen has been elected to the Senate from Mecklenburg County. The House member was elected as one of an eight-member delegation in 1982, after this lawsuit was commenced. Seven other black citizens had previously run unsuccessfully for a House seat. The Senate member served as one of a 4-member delegation from Mecklenburg and Cabarrus Counties from 1975 to 1980. Since then two black citizens have run unsuccessfully and no black now serves on the Senate delegation.

Since World War II, blacks, who now constitute 31% of the city's population, have been elected to the City Council of Charlotte, but never in numbers remotely proportional to their percentage of the city's population. During the period 1945 to 1975, when the council was elected all at-large, blacks constituted 5.4% of its membership. From 1977-1981, when the council was elected partially at-large and partially by districts, blacks won 28.6% of the district seats compared with 16.7% of the at-large seats, though more ran for the latter than the former.

One black citizen has been elected (three times) and defeated one time for membership on the five-member County Board of Commissioners, and presently serves. Two black citizens have been elected and now serve on the nine-member County Board of Education.

Following trial of this action, a black citizen was elected mayor of the City of Charlotte, running as a Democrat against a white Republican. The successful black candidate, a widely-respected architect, received approximately 38% of the white vote.

##### **House District No. 29 (part of Forsyth County).**

Before 1974 Black citizens had been elected to the City Council of Winston-Salem, but to no other public office. In 1974 and again in 1976 a black citizen was elected to the House of Representatives as one of a five-member delegation. In 1978 and 1980 other black citizens ran unsuccessfully for the House. In 1982, after this litigation was commenced, two black citizens were elected to the House.

No black citizen has been elected to the Senate from Forsyth County.

Since 1974, a black citizen has been elected, twice failed to be reelected, then succeeded in being reelected to one of eight seats on the otherwise all-white Board of Education; and another has been elected, failed to be reelected, then succeeded in being reelected to one of five seats on the otherwise all-white Board of County Commissioners.

##### **House District No. 23 (Durham County).**

Since 1973 a black citizen has been elected each two-year term to the State House. No black citizen has been elected to the Senate. Since 1969, blacks have been elected to the Board of County Commissioners, and three of twelve Durham City Council members are blacks elected in at-large elections. The City of Durham is 47% black in population.

##### **House District No. 21 (Wake County).**

A black citizen has been twice elected to the State House five-member delegation from this district and is presently serving. Another black citizen was elected for two terms to the State Senate, serving from 1975 to 1978.



A black citizen has been twice elected Sheriff of Wake County and is presently in that office. Another black citizen, who lives in an affluent white neighborhood, has served since 1972 as the only black on the seven-member County Board of Commissioners. Another black citizen, elected from a majority black district, serves as the only black on the nine-member County School Board. Another black citizen served one term as mayor of the City of Raleigh from 1973 to 1975, and still another serves on the Raleigh City Council.

**House District No. 8 (Edgecombe, Nash, Wilson Counties).**

There has never been a black member of the State House or Senate from the area covered by this district. There had never been a black member of the Board of County Commissioners of any of the three counties until 1982 when two blacks were elected to the five-member Board in Edgecombe County, in which blacks constitute 43% of the registered voters. In Wilson County, where the black population is 36.5% of the total, one of nine members of the County Board of Education is black. In the City of Wilson, which is over 40% black in population, one of six city councilmen is black.

**Senate District No. 2 ( Northampton, Hertford, Gates, Bertie, Chowan, and parts of Washington, Martin, Halifax and Edgecombe Counties).**

No black person has ever been elected to the State Senate from any of the area covered by the district. In the last four years, black candidates have won three elections for the State House from areas within the borders of this district, one in 1980 in a majority-white multi-member district, two in 1982 in different majority-black districts. In Gates County, where 49% of the registered voters are black, a black citizen has been elected and presently serves as Clerk of Court. In Halifax County, black citizens have run unsuccessfully for the Board of County Commissioners and for the City Council of Roanoke Rapids.

Looking only to these basic historical facts respecting black citizens' election to public office, we draw the following inferences. Thirty-five years after the first successful candidacies for public office by black citizens in this century, it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina. The chances of a black candidate's being elected are better where the candidacy is in a majority-black constituency, where the candidacy is in a single-member rather than a multi-member or at-large district, where it is for local rather than statewide office, and where the black candidate is a member of the political party currently in the ascendancy with voters. Relative to white candidates running for the same office at whatever level, black candidates remain at a disadvantage in terms of relative probability of success. The overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population. There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.<sup>27</sup> In any event, the success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even

<sup>27</sup> Both parties offered evidence—anecdotal, informed "lay opinion," and documentary—to establish on the one hand that recent black successes indicated an established breakthrough from any preexisting racial vote dilution and on the other, that those successes are too "haphazard" and aberrational in terms of specific candidacies, issues, and political trends and, in any event, still too minimal in numbers, to support any such ultimate inference. Heavily emphasized with respect to successful black candidacies in 1982 was the fact that in some elections the pendency of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting, and that this cannot be expected to recur. Our finding, as stated in text, reflects our weighing of these conflicting inferences.

arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

#### Racial Polarization in Voting

Statistical evidence presented by duly qualified expert witnesses for plaintiffs, supplemented to some degree by direct testimony of lay witnesses, establishes, and we find, that within all the challenged districts racially polarized voting exists in a persistent and severe degree.

#### Multi-Member Districts

To analyze the existence and extent of any racially polarized voting in the challenged multi-member districts, Dr. Bernard Grofman, a duly qualified expert witness for plaintiffs, had collected and studied data from 53 sets of recent election returns involving black candidacies in all of the challenged multi-member districts.<sup>29</sup> Based upon two complementary methods of analysis of the collected data,<sup>30</sup> Grofman gave as his opinion, and we find, that in each of the elections analyzed racial polarization did exist and that the degree revealed in every

<sup>29</sup> Included were all the elections for the General Assembly in which there were black candidates in Mecklenburg, Durham, and Forsyth County; elections for the State House of Representatives in Wilson, Edgecombe, and Nash Counties; and elections for the State Senate in Cabarrus County for the election years 1978, 1980, and 1982; county-wide local elections in each of Wilson, Edgecombe and Nash Counties in which there were black candidates. The 53 elections included both primary and general elections and represented a total of 32 different election contests.

<sup>30</sup> The two methods employed, both standard in the literature for the analysis of racially polarized voting, were an "extreme case" analysis and an "ecological regression" analysis. The extreme case analysis focuses on voting in racially segregated precincts; the regression analysis uses both racially segregated and racially mixed precincts and provides any corrective method to reflect the fact that voters in the two types may behave differently. In Dr.

(footnote continued on next page)

election analyzed was statistically significant, in the sense that the probability of its occurring by chance was less than one in 100,000;<sup>30</sup> and that in all but two of the elections the degree revealed was so marked as to be substantively significant, in the sense that the results of the individual election would have

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Grofman's analysis the results under both methods conformed closely in most cases. The purpose of both methods is simply to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates.

Defendants' duly qualified expert witness, Dr. Thomas Hofeller, had studied Dr. Grofman's data and the mathematics of his analysis of that data, and heard his live testimony. Aside from two mathematical or typographical errors, Dr. Hofeller did not question the accuracy of the data, its adequacy as a reliable sample for the purpose used, nor that the methods of analysis used were standard in the literature. He questioned the reliability of an extreme case analysis standing alone, but, as indicated, Dr. Grofman's did not stand alone. Dr. Hofeller also questioned Dr. Grofman's failure to make an exact count of voter turn-out by race rather than using estimated figures. The literature makes no such demand of precision in obtaining this figure, and Dr. Grofman's method of estimating is accepted. Dr. Hofeller made no specific suggestion of error in the figures used.

We have accepted the accuracy and reliability of the data collected and the methods of analysis used by Dr. Grofman for the purposes offered. The general reliability of Dr. Grofman's analysis was further confirmed by the testimony of Dr. Theodore Arrington, a duly qualified expert witness for the *Pugh* intervenor-plaintiffs, see note 4, *supra*. Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization in the narrower area of his study.

<sup>30</sup> These conclusions were reached by determining the correlation between the voters of one race and the number of voters who voted for a candidate of specified race. In experience, correlations above an absolute value of .5 are relatively rare and correlations above .9 extremely rare. All correlations found by Dr. Grofman in the elections studied had absolute values between .7 and .98, with most above .9. This reflected statistical significance at the .00001 level - probability of chance as explanation for the coincidence of voter's and candidate's race less than one in 100,000. Cf. *Major v. Treen*, *supra*, slip op. 30-32 n.17 (comparable analysis of racial vote polarization by correlation coefficients).



been different depending upon whether it had been held among only the white voters or only the black voters in the election.<sup>31</sup>

Additional facts revealed by this data support the ultimate finding that severe (substantively significant) racial polarization existed in the multi-member district elections considered as a whole.<sup>32</sup> In none of the elections, primary or general, did a black candidate receive a majority of white votes cast. On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested. Republican voters were more disposed to vote for

<sup>31</sup> The two exceptions involved 1982 State House elections in Durham and Wake Counties, respectively, in which black candidates were elected to seats in majority white multi-member districts. Both were incumbents, and in Durham County there were only two white candidates in the race for three seats so that the black candidate had to win. Though each black candidate won, neither received a majority of the white vote cast. These two exceptions did not alter Dr. Grofman's conclusion that, in his terms, racial polarization in the elections analyzed as a whole was substantially significant. Nor do they alter our finding to the same effect.

<sup>32</sup> Defendants' expert witness questioned the accuracy of any opinion as to the "substantive" significance of statistically significant racial polarization in voting that did not factor in all of the circumstances that might influence particular votes in a particular election. This flies in the face of the general use, in litigation and in the general social science literature, of correlation analysis as the standard method for determining whether vote dilution in the legal (substantive) sense exists, a use conceded by defendant's expert.

white Democrats than to vote for black Democrats. The racial polarization revealed, of course, runs both ways, but it was much more disadvantageous to black voters than to white. Aside from the basic population and registered voter majority advantages had by white voters in any racially polarized setting, fewer white voters voted for black candidates than did black voters for white candidates. In these elections, a significant segment of the white voters would not vote for any black candidate, but few black voters would not vote for any white candidate. One revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates.

The racial polarization revealed in the multi-member elections considered as a whole exists in each of the challenged districts considered separately, as indicated by the following specific findings related to elections within each district.

**House District No. 36 And Senate District No. 22  
(Mecklenburg And Cabarrus Counties).**

In elections in House District No. 36 (Mecklenburg County) between 1980 and 1982, the following percentages of black and white voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

In elections in Senate District No. 22 (Mecklenburg and Cabarrus Counties) between 1978 and 1982, the following per-



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centages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

The fact that candidate Berry received votes from one half of the white voters in the primary does not alter the conclusion that there is substantial racially polarized voting in Mecklenburg County in primaries. There were only seven white candidates for eight positions in the primay and one black candidate had to be elected. Berry, the incumbent chairman of the Board of Education, ranked first among black voters but seventh among whites.

The only other black candidate who approached receiving as many as half of the white votes was Fred Alexander, running in the 1978 Senate primary as an incumbent. Alexander ranked last among white voters in the primary and would have been defeated if the elction had been held only among the white voters.

Approximately 60% of the white voters voted for neither Berry nor Alexander in the general election.

## House District No. 39 (Forsyth County).

In House and Senate elections in Forsyth County from 1978-1982 the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 House -				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25

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	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 House -				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate -				
Small	12	61	n/a	n/a
1982 House -				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

As revealed by this data, no black candidate, whether successful or not, has received more than 40% of the white votes cast in a primary, and no black candidate has received more than 46% of the white votes cast in a general election during the last four elections.

Though black candidates Kennedy and Hauser won the House election in 1982, this does not alter the conclusion that substantial racial polarization of voting continued through that election. White voters ranked Kennedy and Hauser sevcnth and eighth, respectively, out of eight candiates in the general election. In contrast black voters ranked them first and second respectively.

## House District No. 23 (Durham County).

In House and Senate Elections from 1978 through 1982, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 Senate -				
Barns (Repub.)	n/a	n/a	17	5
1978 House -				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89

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	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1980 House - Spaulding	n/a	n/a	49	90
1982 House - Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

Black candidate Spaulding ran uncontested in the general election in 1978 and in the primary and general election in 1980. In the 1982 election there was no Republican opposition and the general election was, for all practical purposes, unopposed. A majority of white voters failed to vote for the black candidate in the general election in each of these years even when they had no other choice. Furthermore, in the 1982 primary, there were only two white candidates for three seats so that one black necessarily had to win. Even in this situation, 63% of white voters did not vote for the black incumbent, the clear choice of the black voters. At least 37% of white voters voted for no black candidate even when one was certain to be elected.

House District No. 21 (Wake County).

In elections for the North Carolina House of Representatives from 1978 through 1982 the following percentages of white and black voters voted for the black candidate indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

The fact that black candidate Blue won election in the last two of these candidacies does not alter the conclusion that substantial racial polarization in voting persists in this district. In Wake County winning the Democratic primary is historically tantamount to election. Nevertheless, in these elections

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from 60% to 80% of white voters did not vote for the black candidate in the primary compared to 16% and 80% of black voters who did.

Wake County is overwhelmingly Democratic in registration and normally votes along party lines. Nonetheless, 55% of white voters did not vote for the black Democrat in the general election.

House District No. 8 (Wilson, Nash, Edgecombe Counties).

In county-wide or district-wide elections from 1976 through 1982 in House District No. 8 and Wilson, Edgecombe and Nash Counties, the following percentages of white and black voters voted for the black candidates indicated:

	<i>Primary</i>		<i>General</i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
House District No. 8				
1982 House-Carter	4	66		
Wilson County				
1982 Congress-				
1st Primary-Michaux	6	96		
2nd Primary-Michaux	7	98		
1976 County Commission-				
Jones	32	77		
Edgecombe County				
1982 Congress-				
1st Primary-Michaux	2	84		
2nd Primary-Michaux	3	97		
1982 County Commission-				
Green	0	14		
McClain	0	27		
Thorne	4	75	38	91
Walker	2	82	36	94

	Primary		General	
	White	Black	White	Black

*Nash County*

1982 Congress-

1st Primary

6 73

2nd Primary

6 81

1982 County Commission-

Sumner

9 82

With one exception, over this period more than 90% of the white voters have failed to vote for the black candidate in every primary in each of these three counties. The one time, in 1982, that black Democratic candidates have run in a general election, they failed to receive over 60% of the white vote even though Edgecombe County is overwhelmingly (88.5%) Democratic.

This data reveals racial polarization of voting in House District No. 8 so extreme that, all other factors aside, no black has any chance of winning election in the district as it is presently constituted. This conclusion, as expressed in evidence by plaintiffs' expert witness, was not seriously challenged by defendants.

**Single-Member District****Senate District No. 2.**

Essentially unchallenged and un rebutted opinion evidence given by plaintiffs' expert witness, Dr. Grofman, and testimonial evidence of experienced local political observers and black community leaders establishes that severe and persistent racial polarization in voting exists in the area covered by the challenged single-member Senate District No. 2.

Based on these evidentiary findings with respect to racial polarization in voting, we find that in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and that in each district it presently operates to minimize the voting strength of black voters.

**Other Factors Bearing Upon The Claim  
Of Racial Vote Dilution**

*Increased participation by black citizens in the political process.*

The court finds that in recent years there has been a measurable increase in the ability and willingness of black citizens to participate in the state's political processes and in its government at state and local levels. The present state administration has appointed a significant number of black citizens to judicial and executive positions in state government, and evinces a good faith determination further to open the political processes to black citizens by that means. In some areas of the state, including some of those directly involved in this litigation, there is increased willingness on the part of influential white politicians openly to draw black citizens into political coalitions and openly to support their candidacies. Indeed, among the witnesses for the state were respected and influential political figures who themselves fit that description.

The court has considered what this implies for the plaintiffs' claim of present racial vote dilution—of a present lack of equal opportunity by black citizens relative to white citizens to participate in the political process and to elect candidates of their choice. Our conclusion is that though this wholesome development is undoubtedly underway and will presumably continue, it has not proceeded to the point of overcoming still entrenched racial vote polarization, and indeed has apparently done little to diminish the level of that single most powerful factor in causing racial vote dilution. The participatory level of black citizens is still minimal in relation to the overall black population, and, quite understandably, is largely confined to the relatively few forerunners who have achieved professional status or otherwise emerged from the generally depressed socio-economic status which, as we have found on the record produced in this case, remains the present lot of the great bulk of black citizens.



### Divisions Within The Black Community.

Not all black citizens in North Carolina, notwithstanding that the class technically certified in this action includes all who are registered to vote, share the same views about the present reality of racial vote dilution in the challenged districts (or presumably elsewhere), nor about the appropriate solution to any dilution that may exist.

Several black citizens testified in this action, as witnesses for the state, to this effect, identifying their own views as opposed to those advanced by plaintiffs' witnesses. In terms of their experience, achievement and general credibility as witnesses, the views of these defendant-witnesses were clearly as deserving of acceptance by the court as were those of the black citizens who, in larger numbers, testified as witnesses for the plaintiffs.

Two facts appeared, however, to the court. The first is that the views expressed by defendants' witnesses went almost exclusively to the desirability of the remedy sought by plaintiffs, and not to the present existence of a condition of vote dilution. The other fact is that the defendants' witnesses' views must be accounted, on the record adduced in this case, a distinct minority viewpoint within the plaintiff class as certified. The division between the two elements is essentially one of proper political ends and means to break free of racial vote dilution as a present condition, and not of the present existence of that condition. Only if a dissident element were so large as to draw in question the very existence of an identifiable black community whose "ability to participate" and "freedom to elect candidates of its choice" could rationally be assessed, could the existence of a dissident view have relevance to the establishment of a racial vote dilution claim. That clearly is not the circumstance here, on the record made in this action. As earlier indicated, the further political question of the proper means to eradicate such racial vote dilution as might be shown presently to exist has been decided by Congress and does not properly figure in our judicial inquiry. See Part II, *supra*.

### Fairness Of The State Legislative Policy Underlying The Challenged Redistricting

Under amended § 2 it presumably remains relevant to consider whether race-neutral and compelling state policies might justify a redistricting plan that concededly, or at least arguably, "results" *prima facie* in racial vote dilution. The Senate Report, discussing the continued relevance of the "tenuous state policy" inquiry as one of the incorporated *Zimmer* factors that evolved in *White v. Regester* dilution jurisprudence, indicates as much, though "tenuousness" as a gauge of intent is obviously no longer relevant under § 2's "result-only" test.

If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, *supra* note 10, at 29 & n.117. See also *Major v. Treen*, *supra*, slip op. 67-74 (analyzing state redistricting policy in terms of fairness).

The parties in this litigation have addressed the point under the "tenuous state policy" rubric, and we will assume the inquiry's continued relevance under a "results"-only test. On this basis, we are persuaded that no state policy, either as demonstrably employed by the legislature in its deliberations, or as now asserted by the state in litigation, could "negate a showing" here that actual vote dilution results from the challenged district plan.

During the legislative deliberations on the redistricting plan, the legislature was well aware of the possibility that its plan could result under then applicable federal law in impermissible dilution of black citizens' voting strength if concentrations of black voters were intentionally "submerged" in multi-member districts or "fractured" into separate districts. That fact was brought to its attention by special counsel, by black citizens' groups concerned with the problem, and by various

legislators who proposed plans specifically designed to avoid any possibility of impermissibly diluting black citizens' votes in these ways. The specific dilution problems presented by the black voter concentrations in the challenged districts in this litigation were known to and discussed in legislative deliberations.

The basic policy justification advanced by the state in this litigation for the legislature's declination to create single-member districts to avoid submerging concentrations of black voters in the challenged multi-member districts was the maintenance of an historical, functionally sound tradition of using whole counties as the irreversible "building blocks" of legislative districting. Although the state adduced fairly persuasive evidence that the "whole-county" policy was well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications, that all became largely irrelevant as matters developed in this particular legislative redistricting plan. At the time of its final enactment, the state policy—though compelled—was that counties *might* be split. When the Attorney General declined to give preclearance to the state constitutional prohibition of county divisions in redistricting, the state acquiesced and, indeed, divided counties thereafter both in non-covered as well as covered counties in the final redistricting plan. See note 3, *supra*. To the extent the policy thereafter was to split counties only when necessary to meet population deviation requirements or to obtain § 5 preclearance of particular districts—and this is what the record demonstrates—such a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution.

The same findings apply, though with added force, to Senate District No. 2. There, of course, in the final plan counties *were* split; indeed four were split in the face of a proposed plan which would have yielded an effective black-majority single-member district which only involved splitting two counties. Other policy considerations that were plainly shown to have influenced the legislature in its final drawing of Senate District No. 2 lines

were the protection of incumbents and, in the words of one legislator-witness in this action, swallowing the "smallest of three pills" offered by the Justice Department in preclearance negotiations respecting the lowest permissible size of the black population concentration in the district. Obviously, neither of these policies could serve to outweigh a racial dilution result.

The final policy consideration suggested by the state is the avoidance of race-conscious gerrymandering. While there may be some final constitutional constraint here, *cf. Karcher v. Daggett*, \_\_\_ U.S. \_\_\_, \_\_\_, 51 U.S.L.W. 4853, 4860 (U.S. June 22, 1983) (Stevens, J., concurring), we find that it is not approached here by the available means of avoiding submergence or fragmentation of any of the black voter concentrations at issue. The most serious problem is that posed by the configuration of the black voter concentration in House District No. 8, comprised of Wilson, Nash and Edgecombe Counties. The configuration of the single-member district specifically suggested by the plaintiffs as a viable one is obviously not a model of aesthetic tidiness. But given the evidence, not challenged by defendants, that in the present multi-member district the black population, 39.5% of the total, simply cannot hope ever to elect a candidate of its choice, aesthetics, as opposed to compactness and commonality of interests, cannot be accorded primacy. See *Carstens v. Lamm*, *supra*; *Skolnick v. State Electoral Board*, 336 F. Supp. 839, 843 (N.D. Ill. 1971) (three-judge court) (even compactness not a fundamental requirement).

#### Ultimate Findings Of Fact

1. Considered in conjunction with the totality of relevant circumstances found by the court—the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting, substantial to severe racial polarization in voting, the effects of thirty years of persistent racial appeals in political campaigns, a relatively depressed socio-economic status resulting in significant degree from a century of *de jure* and *de facto* segregation, and the



continuing effect of a majority vote requirement—the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Considered in conjunction with the same circumstances, the creation of single-member Senate District No. 2 results in the black registered voters in an area covered by Senate Districts Nos. 2 and 6 having their voting strength diluted by fracturing their concentration into two districts in each of which they are a voting minority and in consequence have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.<sup>20</sup>

<sup>20</sup> The state challenges the basic premise of this finding with the familiar argument that the relative merits of legislative division of a minority population that is not large enough to form voting majorities in two single-member districts into an effective voting majority in one single-member district and an ineffective minority in another or, on the other hand, dividing it into two substantially influential minorities in two districts is so problematical that neither the one nor the other division can properly be adjudged "dilutive" by a court. See, e.g., *Seamon v. Upham*, 536 F. Supp. 931, 949 (E.D. Tex.) (three-judge court) *rev'd on other grounds*, 456 U.S. 37 (1982); compare *Jordan v. Winter*, 541 F. Supp. 1135, 1143 (N.D. Miss. 1982) (three-judge court), *vacated and remanded for further consideration in light of amended § 2*, 103 S. Ct. 2077 (1983) (legislative preference unchallengeable) with *Kirksey v. Board of Supervisors*, 534 F.2d at 150 (dilution possible even if one of districts has a bare black population majority). The specific argument here is that any increase in the present minority population of 55.1% in Senate District No. 2 will be at the expense of the present 49.3% black population in Senate District No. 6, the obvious source of District 2 increase.

We are not impressed with the argument. While the dilemma is a real one, we think it is one that Congress has, in effect, committed to the judgment of the black community to whom it has given the private right of action under amended § 2. The right created is, by definition, that of a "class" and the procedural means of vindicating it by a class action has also been provided by

(footnote continued on next page)

## IV

## CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter of the action under 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1973c.

2. The court is properly convened as a three-judge court under 28 U.S.C. § 2284(a).

3. The action has been properly certified as a class action on behalf of all black residents of North Carolina who are registered to vote. No challenge is made to the propriety of the class action under any of the criteria of the governing class action rule, Rule 23, Fed. R. Civ. P.

4. Of the challenged districts, only House District No. 8 (Wilson, Edgecombe and Nash) and Senate District No. 2 include counties that are covered under § 4(a) of the Voting

(footnote continued from previous page)

Congress in Fed. R. Civ. P. 23. When, as here, such a class action is brought by a class which includes such a fragmented concentration of black voters, a group judgment about the group's best means of access to the political process must be assumed reflected in the specific claim made by the class. The legitimacy of that group judgment, from the standpoint of members of the class identified, can be put to test by standard procedures: by challenges to the adequacy of representation or the typicality of claims by any members of the identified class who question the wisdom or validity of the class claim under Rule 23(a)(3) & (4), Fed. R. Civ. P., or even by attempted intervention under Rule 24, Fed. R. Civ. P. When, as here, no such challenges are made, a dilution claim made by the class is properly assessed in the terms made, and on the understanding that any judgment entered on its basis will be binding on all members of the class who may not later second-guess it under ordinary principles of claim preclusion, see Restatement (Second) Judgments § 24 comments b, c; § 25 comments f, m; § 41(1)(e), (2) comment e, or, possibly, judicial estoppel, see *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982).

If this were not the approach taken, a foolproof means would be provided for irremediable fracturing of any such minority voter concentration. That cannot have been intended by Congress. A different situation of course would be presented if the class of black voters bringing such a dilution-by-fracturing claim included only the voters in one of the districts into which the fracturing had occurred. That is not this case.



Rights Act and for which preclearance is required under § 5 of that Act, 42 U.S.C. § 1973c.

The Attorney General's indication on April 27, 1982, that, so far as it affected covered counties, he would interpose no objection under § 5 to the legislative enactment of the redistricting plan which, *inter alia*, created House District No. 8 and Senate District No. 2 does not have the effect of precluding this claim by plaintiffs brought under amended § 2 to challenge the redistricting plan in respect of these two districts. 42 U.S.C. § 1973c; *Major v. Treen*, *supra*, slip op. at 200 n.1; *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 59 n.9 (5th Cir. 1979); *see also Morris v. Gressette*, 432 U.S. 491, 506-07 (1977). Because the standards by which the Attorney General assesses voting changes under § 5 are different from those by which judicial claims under § 2 are to be assessed by the judiciary, *see* S. Rep. No. 97-417, *supra* note 10, at 68, 138-39, and because the former are applied in a non-adversarial administrative proceeding, the Attorney General's preclearance determination has no issue preclusive (collateral estoppel) effect in this action. *See* Restatement (Second) Judgments §§ 27 comment C; 83(2) & (3) (1980).

5. The meaning and intended application of amended § 2 of the Voting Rights Act in relation to the claims at issue in this action are as stated in Part II of this Memorandum Opinion.

6. On the basis of this court's ultimate findings of fact, the plaintiffs have established that the creation by the General Assembly of North Carolina of multi-member House Districts Nos. 8, 21, 23, 36 and 39, multi-member Senate District No. 22, and single-member Senate District No. 2 will, as applied, result in an abridgement of their voting rights, as members of a class protected by subsection (a) of amended § 2 of the Voting Rights Act, in violation of that section.

7. The plaintiffs are entitled to appropriate relief from the violation.

## V

## REMEDY

Having determined that the state's redistricting plans, in the respects challenged, are not in compliance with the mandate of amended § 2 of the Voting Rights Act, the court will enter an order declaring the redistricting plan violative of § 2 in those respects, and enjoining the defendants from conducting elections pursuant to the plan in its present form.

In deference to the primary jurisdiction of state legislatures over legislative reapportionment, *White v. Weiser*, 412 U.S. 783, 795 (1973), we will defer further action to allow the General Assembly of North Carolina an opportunity to exercise that jurisdiction in an effort to comply with § 2 in the respects required. This is especially appropriate where, as here, the General Assembly adopted the plan found violative of § 2 before the enactment of the amended version of that statute which now applies, and where there has accordingly been no previous legislative opportunity to assess the amended statute's substantial new requirements for affirmatively avoiding racial vote dilution rather than merely avoiding its intentional imposition.

Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class in the ways here found, or in other ways. *See In re: Illinois Congressional Districts Reapportionment Cases*, No. 81 C 1395, slip op. (N.D. Ill. 1981), *aff'd mem. sub nom.*, *Ryan v. Otto*, 454 U.S. 1130 (1982); *Rybicki v. State Board of Elections*, No. 81 C 6030 (N.D. Ill. Jan. 12, 1982); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

Recognizing the difficulties posed for the state by the imminence of 1984 primary elections, the court will convene at any time, upon request of the state, to consider and promptly to rule upon any redistricting plan that has been enacted by the

State in an effort to comply with the mandates of § 2 and with this decision. Failing legislative action having that effect within a reasonable time under the circumstances, not later than March 16, 1984, the court will discharge its obligation to develop and implement an appropriate remedial plan.

An appropriate order will issue.

# I. STIPULATIONS

The parties to *Gingles v. Edmisten* and *Pugh v. Hunt* enter into the following stipulation for use in these actions.

## A. Jurisdictional Stipulations (1-6)

## B. Legislative Chronology (7-48 with Exhibits A-II and AAA-BBB)

## C. Other Stipulations of Fact (49-193 with Exhibits JJ-SS)

### A. Jurisdictional Stipulations

1. The Court has jurisdiction over the subject matter of these two actions pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3) and (a)(4).

2. A three judge court is properly convened pursuant to 28 U.S.C. § 2284(a).

3. The court has jurisdiction over all parties to the actions.

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4. *Gingles v. Edmisten* has been properly certified as a class action on behalf of all black residents of North Carolina who are registered to vote.

5A. Ralph Gingles is an adult black resident of Gaston County, North Carolina and is registered to vote.

B. Sippio Burton is an adult black resident of Cumberland County, North Carolina and is registered to vote.

C. Joe P. Moody is an adult black resident of Halifax County, North Carolina and is registered to vote.

D. Fred Belfield is an adult black resident of Edgecombe County, North Carolina and is registered to vote.

• • • • •



6C. Maron McCullough, is an adult black resident of Iredell County and is registered to vote and affiliated with the Republican party.

6D. Paul B. Eaglin is an adult black resident of Cumberland County and is registered to vote and affiliated with the Republican party.

• • • • •

6I. Joe B. Roberts is an adult black resident of Mecklenburg County is registered to vote and is affiliated with the Republican party.

#### B. Legislative Chronology

7. The 1981 General Assembly, pursuant to N.C.G.S. 120-11.1, convened on Wednesday, January 14, 1981.

8. On January 16, 1981, the Speaker of the North Carolina House of Representatives, the Honorable Liston B. Ramsey, pursuant to Rules 26 and 27 of the Rules of the 1981 House of Representatives, General Assembly of North Carolina, appointed the following members of the Legislative Redistricting Committee: Representatives Jones and Lilley, Chairmen; Representatives Bundy and Messer, Vice Chairmen; Representatives Almond, Barnes, Beam, Blue, Bone, Brennan, Chapin, Church, D. Clark, Craven, Creecy, Diamont, En'oe, Bob Etheridge, Evans, Gillam, Grady, Guy, Hackney, Hege, Hiatt, Hightower, Holmes, J. Hunt, R. Hunter, T. Hunter, Lacey, McAlister, Morgan, Nash, Nesbitt, Nye, Quinn, Rabon, Redding, Rhodes, Spaulding, and Taylor.

9. Representatives Blue, Creecy and Spaulding were the only black members of the House during the 1981 General Assembly.

10. On January 19, 1981, the President of the North Carolina Senate, the Honorable James C. Green, pursuant to Rules 31 and 32 of the Rules of the 1981 Senate, Gen-

eral Assembly of North Carolina, appointed the following members of the Committee on Redistricting—Senate: Senators Rauch, Chairman; Duncan, Allsbrook, Vice-Chairmen; Allred, Ballenger, Barnes, Boger, Cavanagh, Clarke, Creech, Garrison, Gray, Hardison, Harrington, Kincaid, Lawing, Mills, Noble, Palmer, Raynor, Royall, Soles, Speed, Thomas of Craven, Thomas of Henderson, Walker, Warren, and Wright. The members of the Committee on Redistricting—Senate, appointed on January 19, 1981, were all white.

11. On July 2, 1981, Chapter 771 of the 1981 Session Laws (Regular Sessions, 1981), AN ACT TO PROVIDE FOR THE SEVERABILITY OF PROVISIONS OF REDISTRICTING ACTS OF THE GENERAL ASSEMBLY, was ratified in the General Assembly. (Exhibit A).

12. On July 3, 1981, Chapter 800 (House Bill 415) of the 1981 Session Laws (Regular Sessions, 1981), which redistricted the House of Representatives, was ratified in the General Assembly. (Exhibit B). The Legislative Services Office prepared a map indicating districts of and computer statistics analyzing the districts created by that Chapter (Exhibit C, D, respectively).

13. On July 3, 1981, Chapter 821 (Senate Bill 313) of the 1981 Session Laws (Regular Sessions, 1981) which redistricted the Senate was ratified in the General Assembly. (Attachment E). The Legislative Services Office prepared a map indicating and computer statistics analyzing the districts created by that Chapter. (Exhibits F, G respectively).

14. On September 16, 1981 *Gingles v. Edmisten*, 81-803-CIV-5, was filed alleging, *inter alia* that the apportionments of the North Carolina House of Representatives and Senate violated the one person one vote requirement of the equal protection clause, illegally and unconstitutionally diluted the voting strength of black citizens, and



that Article II, §§ 3(3) and 5(3) of the North Carolina Constitution were being enforced without having been pre-cleared pursuant to § 5 of the Voting Rights Act.

15. On September 23, 1981, North Carolina made its initial submission of Article II, § 3(3) and § 5(3) of the North Carolina Constitution to the United States Department of Justice pursuant to § 5 of the Voting Rights Act. This submission was completed on October 1, 1981.

16. On October 10, 1981, the President Pro Tempore of the Senate appointed Senator Frye of Guilford County to the Committee on Redistricting—Senate in response to a request by Senator Gray of Guilford County that she be removed from the Committee.

17. Senator Frye was the only black member of the Senate during the 1981 General Assembly.

18. On October 29, 1983, the General Assembly met again to consider redistricting pursuant to Resolutions 66 and 80 of the 1981 Session Laws (Regular Sessions, 1981). (Exhibits H, I).

19. On October 30, 1981, Chapter 1130 (House Bill 1428) of the 1981 Session Laws (Regular Sessions, 1981), AN ACT TO APPORTION THE DISTRICTS OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, was ratified in the General Assembly (Exhibit J). The Legislative Services Office prepared a map indicating and computer statistics analyzing the districts created by that Chapter. (Exhibits K, L respectively). The General Assembly did not enact a new apportionment of the Senate.

20. The Legislative Services Office did not systematically analyze proposed reapportionment plans using race as a factor until after the October, 1981 legislative sessions.

21. On November 25, 1981, *Pugh v. Hunt*, 81-1066-CIV-5 was filed in the Superior Court for Iredelle County, North

Carolina. It was subsequently removed to this Court. It alleged, *inter alia* that the apportionments of the North Carolina House of Representatives and the North Carolina Senate violate the Fourteenth Amendment of the United States Constitution.

22. By letter of November 30, 1981, the United States Attorney General interposed objection pursuant to § 5 of the Voting Rights Act to two amendments to the Constitution of North Carolina, Article II, § 3(3) and § 5(3). (Exhibit M).

23. By letter of December 7, 1981, the United States Attorney General interposed an objection pursuant to § 5 of the Voting Rights Act to Chapter 894 (S.B. 87,) and Chapter 821 (S.B. 313), North Carolina's reapportionment plans for the State Senate and the United States Congress. (Exhibit N).

24. The Legislative Services Office, in analyzing plans proposed or adopted after December, 1981, used the population statistics indicated in Exhibit N-1.

25. By letter of January 20, 1982, the United States Attorney General interposed an objection pursuant to § 5 of the Voting Rights Act to Chapter 1130 (H.B. 1428,), North Carolina's reapportionment plan for the State House of Representatives. (Exhibit O).

26. On January 28, 1982, the Senate Committee on Redistricting—Senate and the House Redistricting Subcommittee met to be briefed by the State's retained counsel. At a joint meeting the Senate Committee and the House Subcommittee adopted the redistricting criteria in Exhibit O-1. On February 2, the full House Committee on Legislative Redistricting adopted the amended redistricting criteria contained in Exhibit O-2.

27. On February 3, 1982, Representative Joe Hege presented to the House Committee on Legislative Redistrict-

ing a map illustrating the Republican House single-member redistricting plan, attached as the final document in the minutes and transcripts of the House Legislative Redistricting Committee, entitled "*House Legislative Redistricting, February Session—1982*" (Exhibit LLL).

The plan contained all single member house districts of contiguous territory and had, according to statistics supplied by Mr. Hege, a population deviation of less than plus or minus 5%. The apportionment included majority black single member districts in Mecklenburg, Forsyth, Guilford, Cumberland, Wake, Durham, and Northeast North Carolina.

28. On February 4, 1982, the Congressional redistricting committees of the House and Senate, the Senate Committee on Redistricting—Senate and the House Committee on Legislative Redistricting held a joint public hearing in the State Legislative Building in Raleigh. Notices of the hearing were published in the *Asheville Citizen* and *Asheville Times*, *Durham Morning Herald*, the *Raleigh News and Observer*, and the *Charlotte Observer*, on January 31, February 1, 2, 3, and 4, 1982, with the exception of the *Asheville Citizen* and *Asheville Times*, which did not publish on January 31, 1982. Said notice, in its entirety, is reflected by Exhibit P. In addition, those groups listed in Exhibits Q and Q-1 were provided with press releases and supporting information in the manner indicated. (Exhibits Q, Q-1). A transcript of this public hearing is attached as Exhibit AAA.

29. On February 4, 1982, at the public hearing, the North Carolina Black Lawyers Association submitted a proposed apportionment of the North Carolina Senate which contained three majority black single-member districts. Each of the single-member districts in the apportionment plan contained contiguous territory and had a population deviation of less than plus or minus 5%. The statistics used to produce this plan were obtained from

the 1980 census and are accurate. This apportionment included a Senate district wholly within Mecklenburg County which is 62.3% black and a Senate district in northeast North Carolina which is 60.7% black.

30. At the public hearing on February 4, 1982 the North Carolina Black Lawyers Association presented a proposed apportionment of the North Carolina House of Representatives which contained ten majority black single-member districts. This map included a single-member district wholly within Wake County which is 67% black, a single-member district wholly within Durham County which is 71.9% black, a single-member district wholly within Forsyth County which is 81.6% black, a single-member district in Mecklenburg County which is 69.9% black, and an additional single-member district in Mecklenburg County which is 56.8% black. The single-member districts in this plan all contain contiguous territory, have less than plus or minus 5% population deviation and are statistically accurate based on the 1980 census.

31. The House and Senate proposals of the North Carolina Black Lawyers Association are attached as the final two documents in the "*N.C. General Assembly Extra Session 1982, Redistricting Public Hearings of 02-04-82, Minutes, Transcripts, and Attachments*" (Exhibit AAA).

32. On February 9, 1982, the North Carolina General Assembly convened in an extra session for the purpose of enacting new apportionment plans for the State House of Representatives, State Senate, and United States Congress pursuant to a proclamation of the Governor. (Exhibit Q-2).

33. On February 11, 1982, Chapter 4 (House Bill 1) of the Session Laws of the First Extra Session 1982, which again redistricted the House of Representatives was ratified in the General Assembly. (Exhibit R). The Legislative Services Office prepared a map and computer statis-



tics analyzing the districts created by this Chapter. (Exhibits S, T respectively).

34. On February 11, 1982, Chapter 5 (Senate Bill 1) of the Session Laws of the First Extra Session, 1982, which again redistricted the Senate was ratified in the General Assembly on February 11, 1982. (Exhibit U). The Legislative Services Office prepared a map indicating and computer statistics analyzing the districts created by this Chapter. (Exhibits V, W respectively).

35. In addition, by Chapter 7 of the Session Laws of the First Extra Session, the General Assembly enacted a new apportionment of North Carolina's Congressional districts. This plan was pre-cleared by the United States Attorney General, and by Order dated April 27, 1982, the claims in *Gingles v. Edmisten*, regarding the Congressional plans were voluntarily dismissed.

36. In addition to enacting its State legislative redistricting plans, the General Assembly ratified on February 11, 1982, Chapter 3 of the Session Laws of the First Extra Session, 1982 providing, among other matters, for alternative dates for North Carolina's filing period and primaries. (Exhibit X).

37. By letter of April 19, 1982, the United States Attorney General interposed an objection to the House and Senate Redistricting Plans, Chapters 4 and 5 of the Session Laws of the First Extra Session, 1982, and deferred consideration of Chapter 3. (Exhibit Y). On April 26, 1982, the General Assembly reconvened for the Second Extra Session.

38. On April 26, 1982, Representative Joe Hege filed House Bill 7 which would create a single-member redistricting plan for the House. The bill was drawn by the Legislative Services Office's Bill Drafting Division using a computer print-out furnished by Representative Hege (Exhibit Y-1, Y-2, respectively). House Bill 7 received its

first reading on April 27, 1982, and was referred to the House Committee on Legislative Redistricting.

39. On April 27, 1982, Senator Ballenger offered to the Committee on Redistricting—Senate a map with accompanying statistics outlining a single-member Senate district plan and by substitute motion, moved its adoption. That motion was tabled. (Exhibits Y-3, Y-2).

40. On April 27, 1982, Senators Ballenger and Wright filed Senate Bill 2 which would create a single-member redistricting plan for the Senate. As the General Assembly adjourned that day the bill never received its first reading. The bill was prepared by the Legislative Services Office's Bill Drafting Division from a computer print-out furnished by Senator Ballenger (Exhibits Y-4, Y-2, respectively).

41. The plans referred to in Paragraphs 32, 33 and 34 all contain contiguous territory, have less than plus or minus 5% population deviation and are statistically accurate.

42. Chapter 1 (House Bill 1) of the Session Laws of the Second Extra Session, 1982, which redrew House Districts 17 and 18, was ratified in the General Assembly on April 27, 1982. (Exhibit Z). The Legislative Services Office produced a map indicating and computer statistics analyzing the new plan. (Exhibits AA, and BB).

43. Chapter 2 (Senate Bill 1) of the Session Laws of the Second Extra Session, 1982, which redrew Senate Districts 1, 2, 3, 6, 9, 10, and 11, was ratified in the General Assembly on April 27, 1982. (Exhibit CC). The Legislative Services Office produced a map indicating and computer statistics analyzing the new plan. (Exhibits DD, EE respectively).

44. On April 27, 1982, Chapter 3 (House Bill 2) of the Session Laws of the Second Extra Session, 1982, which provided, among other matters, for alternative dates for



North Carolina's filing period and primaries. (Exhibit FF).

45. By letter of April 30, 1982, the United States Attorney General indicated that he would not interpose an objection to Chapters 1 and 2 of the Session Laws of the Second Extra Session, 1982, (the amended House and Senate redistricting plans) but interposed an objection to the candidate filing period and primary election date contained in Chapter 3 of said Session Laws. (Exhibit GG.) The State of North Carolina, through the North Carolina State Board of Elections, responded to the objection of the United States Attorney General on May 6, 1982, by revising the 1982 primary election timetable for the State of North Carolina, providing *inter alia*, that the date of the primary elections for 1982 be changed from June 10, 1982, to June 29, 1982, as is exhibited by the letter and attachments to Mr. William Bradford Reynolds from Mr. Alex K. Brock of the State Board of Elections. (Exhibit HH).

46. By letter of May 20, 1982, the Office of the Attorney General indicated it would not interpose an objection to the revised 1982 primary election timetable for 1982 as amended by the State Board of Elections. (Attachment II).

47. In accordance with the revised timetable and with Chapters 2 and 3 of the Sessions Laws of the Second Extra Session, Primary and General Elections were held for the North Carolina General Assembly in 1982.

48. Exhibits AAA-UUU are accurate copies of the Journals of the North Carolina House of Representatives of the North Carolina Senate, the minutes of the House and Senate Redistricting Committees and of the transcripts of committee meetings and floor debates relating to redistricting. The transcripts are accurate transcriptions of those portions of the meetings which they purport to transcribe.

- AAA — NC General Assembly—Extra Session 1982—Redistricting Public Hearings of February 4, 1982—Minutes, Transcripts and Attachments
- BBB — NC General Assembly—First Extra Session 1982—House and Senate Journals
- CCC — 1981 Senate Redistricting—Minutes of Senate Redistricting Committee Meetings and Other Supplementary Materials
- DDD — NC Senate Legislative Redistricting—First Extra Session 1982 (February) Senator Marshall A. Rauch, Chairman
- EEE — Verbatim Transcript of the Senate of the General Assembly of the State of NC—Second Extra Session, April 1982
- FFF — 1981 General Assembly, Regular Sessions—1981 Senate Legislative Redistricting—Committee Meeting Transcripts
- GGG — 1981 Senate Redistricting—October Special Session—Minutes and Supplementary Related Materials
- HHH — NC General Assembly—(Second Extra Session 1982) Bills, Amendments, Roll Calls, and Maps
- III — Journal of the Senate of the General Assembly of the State of NC—Second Extra Session 1982
- JJJ — NC General Assembly 1982—First Extra Session—Transcript of Senate Proceedings—February 9-10-11, 1982—Floor Debate
- KKK — NC General Assembly—First Extra Session 1982 (February)—Summary of Proceedings with Supplementary Materials (Senate)
- LLL — House Legislative Redistricting, February Session—1982

- MMM — NC House of Representatives 1981—Legislative Reapportionment History and Information
- NNN — NC House Reapportionment—October 1981: Legislative History for HB-1428
- OOO — House Legislative Redistricting—April Session—1982
- PPP — NC General Assembly—First Extra Session 1982.—HB-1 (Session Laws Chapter 4): Bill Drafts, Amendments Offered, and Roll Calls
- QQQ — NC General Assembly (Second Extra Session 1982)—House Journal
- RRR — 1981 General Assembly, Regular Sessions 1981—House Legislative Redistricting Committee Meeting Transcripts
- SSS — Volume 1 Minutes—House Legislative Redistricting Committee—February 2, 1982  
Volume 2 Minutes—House Legislative Redistricting Committee—February 3, 1982
- TTT — North Carolina General Assembly Second Extra Session—1982 Senate Legislative Redistricting Committee Meetings—Minutes and Transcripts
- UUU — NC General Assembly (Second Extra Session 1982)—House Legislative Redistricting Committee—Meeting Transcripts (April, 1982)

### C. Other Stipulations of Fact

49. The vote abstracts, voter turnout figures, and voter registration figures used by Bernard Grofman and Thomas Hofeller as the basis of their analyses of or testimony about voting patterns are accurate and genuine. Any party or witness may refer to the information indicated

in these documents during the course of the trial of these actions without further foundation.

50. The following is an accurate list of the black candidates who filed to run in the indicated elections. All candidates were Democrats unless otherwise indicated. This is not a complete list of all elections in which there were black candidates.

### A. Mecklenburg County

1978 Senate — Fred Alexander  
1980 Senate — Fred Alexander  
1980 House — Bertha Maxwell  
1982 Senate — James Polk  
1982 House — Phil Berry  
James Richardson

### B. Durham County

1978 Senate — Alexander Barnes (Rep)  
1978 House — Howard Clement  
Kenneth Spaulding  
1980 House — Kenneth Spaulding  
1982 House — Howard Clement  
Kenneth Spaulding

### C. Forsyth County

1978 House — Harold Kennedy  
Joseph Norme  
C. C. Ross  
1980 Senate — Moses Small  
1980 House — Annie Kennedy  
Joseph Norman  
Rodney Sumter  
1982 House, 39th District—C. B. Houser  
Annie Kennedy  
1981 Winston-Salem—Winston-Salem City Council—  
Southeast Ward Larry Womble

*D. Wake County*

1978 House — Dan Blue  
 1978 Sheriff — John Baker  
 1980 House — Dan Blue  
 1982 House — Dan Blue  
 1982 Sheriff — John Baker

*E. Nash County*

1982 Congress — Mickey Michaux  
 1982 N.C. House — Otis Carter  
 1982 County Commission — Quentin Summer

*Wilson County*

1982 Congress — Mickey Michaux  
 1982 N.C. House — Otis Carter  
 1976 County Commission — Grover L. Jones

*Edgecombe County*

1982 Congress — Mickey Michaux  
 1982 N.C. House — Otis Carter  
 1982 County Commission — Naomi Green  
   Earl McClain  
   J. O. Thorne

51. The General Assembly divided counties in the apportionment of the House of Representatives and of the Senate only when necessary to bring population deviation under plus or minus 5% or when necessary to obtain pre-clearance from the United States Department of Justice pursuant to § 5 of the Voting Rights Act of 1965, as amended.

52. From 1776 through 1981, no county was divided in the formation of either House or Senate districts with the exception of six and then seven borough towns which were additional House districts from 1776 until 1835.

52A. In multimember districts there is no subdistrict or residency requirement which requires that at-large candidates reside in particular geographic subdistricts.

53. From 1835 through 1981 all North Carolina House and Senate Districts have been either single or multimember districts consisting of an entire county of two or more whole counties joined together.

54. On May 27, 1983, Representatives John Jordan and Chris Barker introduced House Joint Resolution Bill 1146 in the North Carolina General Assembly. That resolution authorized the Legislative Research Commission to study the feasibility of redistricting in 1990 so as to have single-member districts. It charged the Commission to produce a map redistricting the Senate and House into single-member districts and to report to the 1985 General Assembly. It was referred to the House Committee on Rules and received an unfavorable report on June 3, 1983.

55. In February and April, 1982 the General Assembly was aware that multi-member districts in Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe and Nash Counties would be maintained if these counties were not divided.

56. For statistics which use white and non-white, non-white is 93% black in North Carolina.



57. The percentage of the population and of the registered voters in the following House and Senate districts is as indicated:

<i>House District and Number</i>	<i>Percentage of population that is Black<sup>1</sup></i>	<i>Percent of Registered Voters that is Black</i>
Mecklenburg (#36)	26.5	18.0 <sup>2</sup>
Forsyth (#39)	25.1	20.8 <sup>2</sup>
Durham (#23)	36.3	28.6 <sup>2</sup>
Wake (#21)	21.8	15.1 <sup>2</sup>
Wilson-Edgecombe-Nash (#8)	39.5	29.5 <sup>2</sup>
<i>Senate Districts</i>		
Mecklenburg-Cabarrus (#22)	24.3	16.8 <sup>2</sup>
Northeast North Carolina (#2)	55.1	46.2 <sup>4</sup>

<sup>1</sup> From Legislative Services Office, derived from 1980 Census.

<sup>2</sup> From October 4, 1982 State Board of Elections Registration Statistics Part II.

<sup>3</sup> October 4, 1982 Forsyth registration minus registration for Belews Creek, Salem Chapel #1 and Salem Chapel #2 precincts.

<sup>4</sup> October 4, 1982 registration for whole counties from State Board of Elections Registration Statistics Part II; township registration October 4, 1982 from Washington, Martin, Halifax, and Edgecombe Boards of Elections.

58. A lower percentage of the black population than of the white population is registered to vote in Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe, Nash, Halifax, Northampton, Hertford, Gates, Martin, Bertie, Washington and Chowan Counties. Specifically, the percentage of the black and white voting age population which is registered to vote in each of these counties is as follows:

<i>County</i>	<i>Percent of Voting Age Population Registered to Vote 1970<sup>1,2</sup></i>		<i>Percent of Voting Age Population Registered to Vote 1980<sup>3</sup></i>	
	<i>White</i>	<i>Black</i>	<i>White</i>	<i>Black</i>
Mecklenburg	66.3	40.6	68.1	43.8
Forsyth	73.0	73.6	69.7	62.8
Durham	72.0	64.0	66.1	43.3
Wake	63.7	37.2	68.3	42.3
Wilson	66.2	36.3	64.4	40.0
Edgecombe	75.4	46.0	67.3	40.7
Nash	48.2	18.4	58.1	21.3
Halifax	92.4	47.9	69.7	48.2
Northampton	107.8	80.7	74.6	61.6
Hertford	73.4	64.6	78.9	60.0
Gates	79.3	57.5	82.5	77.6
Martin	86.6	66.0	73.9	53.3
Bertie	106.2	98.3	77.0	50.1
Washington	68.2	78.1	80.1	64.3
Chowan	77.3	48.7	72.3	53.3

<sup>1</sup> Number of white/non-white voters as of June 5, 1970 divided by total white/black population 21 years old or older.

<sup>2</sup> Beginning in the twelve-month period following the 1972 Presidential Election, county Boards of Elections have been required to remove from permanent registration records the names of all persons who have failed to vote for a period of four years. Beginning January 2, 1981, after the 1980 Presidential Election and thereafter for each subsequent presidential election, county Boards of Elections are not allowed to remove from registration records the name of any person who voted in either one of the two most recent presidential elections or in any other election conducted in the period between the two presidential elections. County Boards of Elections may also remove the names of any persons who have either moved their residence from the county or who have died, as indicated by Certificates of Death received from the State Department of Human Resources or cancellation notices received from other counties and states as to residency.

<sup>3</sup> Number of white/black registered voters as of April 8, 1980 divided by total white/black population 18 years old or older.

59. The following is the percent of the population, the voting age population and the registered voters that is black in the indicated counties:

	<i>Percent of Population that is Black</i>	<i>1980 Percent of VAP that is black</i>	<i>Percent of Reg. voters that is Black</i>
Mecklenburg	26.5	24.0	16.9
Forsyth	24.4	22.0	20.3
Durham	36.3	33.6	24.9
Wake	21.7	20.5	13.7
Wilson	36.4	32.4	23.0
Edgecombe	50.8	46.7	34.6
Nash	32.9	29.4	13.2
Halifax	47.1	44.0	35.2
Northampton	60.7	56.2	51.4
Hertford	54.8	51.1	44.3
Gates	52.6	49.4	47.8
Martin	44.5	40.6	33.1
Bertie	59.2	54.5	44.2
Washington	43.3	39.1	34.0
Chowan	41.5	38.1	31.2

60. Exhibit JJ, entitled "Vital Statistics of Counties in North Carolina," is a compilation of registration figures for each county as of February 9, 1982, with estimated percentages of voting population registered figured for white, non-white, and total voting age populations by race.

61. Exhibits KK and LL "Registration Statistics Parts I and II," is the most recent statewide compilation of voter registration figures for each county in the state by race and party, reported as of October 4, 1982.

62. In 1980 there were 1,319,054 black people in North Carolina. That is 22.4% of the total population. (Source: 1980 Census).

63. The mean income of households in 1979 was as follows:

	<i>Black</i>	<i>White</i>	<i>Difference</i>
North Carolina	\$13,833	\$21,162	\$7,329 (34.6%)
National	\$15,806	\$24,939	\$9,133 (36%)
Difference	\$ 1,973	\$ 3,770	

64. 44.7% of the households with no vehicles available are black households. 75% of black households and 93% of white households have vehicles available.

65. 30.3% of black people in North Carolina live in poverty compared to 10.0% of white people.

66. Non-white households in North Carolina are 23.0% of all households but are 42% of all poverty households. (A poverty household is one in which the combined household income falls below 100% of the poverty level (adjusted by family size) established by the United States Office of Management and Budget.) Blacks account for 11.7% of the United States population but are 32.5% of the United States population living in poverty.

67. In North Carolina 51% of the single parent households have a black head of household.

68. Between 1970 and 1980 non-white workers consistently had a higher incidence of unemployment than white workers. For each of these years non-whites were a higher percentage of claimants for unemployment benefits than the percentage of the workforce which is non-white.

## JA-78

Year	Male non-white Claimants <sup>1</sup>	Male non-white in Workforce <sup>2</sup>	Female non-white Claimants <sup>1</sup>	Female non-white in Workforce <sup>2</sup>
1970	21.0	13.3	18.6	8.5
1971	16.7	13.3	17.8	8.5
1972	17.7	13.3	19.0	8.2
1973	22.8	11.0	18.0	8.6
1974	15.9	11.0	19.0	8.6
1975	13.5	11.0	14.0	8.6
1976	17.6	11.0	13.4	8.6
1977	18.0	11.0	12.6	8.6
1978	22.3	11.2	14.1	9.0
1979	18.1	11.2	17.4	9.0
1980	17.3	11.2	16.2	9.0

<sup>1</sup> Percent of all claimants which is non-white male/female.

<sup>2</sup> Percent of all labor force which is non-white male/female  
[Note: This is taken from the ESC first survey week of each year.]

69. As of June 30, 1980, the percent of North Carolina permanent full-time employees subject to the State Personnel Act, excluding universities, that fall in each salary range was as follows:

## JA-79

Salary Range	Percent of White Employees	Percent of Black Employees
Less than \$8,000	2.06	7.41
\$8,000—\$8,999	5.09	12.40
\$9,000—\$9,999	7.88	14.33
\$10,000—\$10,999	12.15	20.05
\$11,000—\$11,999	11.21	15.82
\$12,000—\$12,999	11.21	10.72
\$13,000—\$14,999	14.59	7.88
\$15,000—\$16,999	8.36	3.55
\$17,000—\$19,999	12.02	4.73
\$20,000—\$23,999	7.54	1.33
\$24,000+	7.88	1.17

Median salaries: White \$13,053  
Black \$10,790

A higher percent of black employees than of white employees is employed at every salary level below \$12,000 and a higher percent of white employees than of black employees is employed at every salary level above \$12,000.

70. As of December 31, 1980, permanent full-time North Carolina State Government employees covered by the State Personnel Act, excluding university system personnel, numbered 50,012, 78% of whom were white, 21% black, and 1% of other ethnic/racial origins. One half of employees earn below the following amounts annually:

	White	Black	Other
male	13000	11000	12000
female	12000	11000	11000

71. The following chart shows the white and black percentage of employees of each salary grade classification group for June 30, 1977, and December 31, 1981. These figures include all permanent full time non-university em-



ployees subject to the State Personnel Act. In the 83-87 category, others (non-white, non-blacks) decreased in both number and percentage. In the 93+ category there were 18 employees on June 30, 1977, and 12 on December 31, 1981.

Salary Grade	White		Black	
	6/30/77	12/31/81	6/30/77	12/31/81
48-52	39.1	37.5	60.4	62.1
53-57	73.6	65.9	25.8	32.7
58-62	85.9	77.1	13.5	21.9
63-67	90.6	88.3	8.8	10.7
68-72	93.7	90.0	5.6	9.0
73-77	95.6	93.2	3.9	5.9
78-82	97.2	94.9	2.5	4.6
83-87	79.3	90.0	6.7	7.0
88-92	83.4	86.8	0.8	2.7
93+	100.0	100.0	0.0	0.0

72. For the period from December 31, 1978, to June 20, 1980, black permanent full-time non-University State Employees subject to the State Personnel Act showed the following percentage increases in the following categories as exemplified by the table below:

	Percentage Increase	Percent Black 12/31/78-6/30/80
Officials and Administrators	+14.5%	5.3% to 6.2%
Skilled Craft	+14.0%	8.6% to 10%
Office and Clerical	+11.7%	12.8% to 14.5%
Protective Service	+11.1%	17.6% to 19.8%
Professional	+10.0%	10.6% to 11.5%
Paraprofessional	+11.0%	34.0% to 38.2%
Service & Maintenance	+ 2.3%	42.9% to 43.9%

73. Infant mortality rates in North Carolina are higher for non-whites than for whites. For the five year period

from 1976-1980 the infant mortality rate by race was as follows:

	Fetal <sup>1</sup>	Neonatal <sup>2</sup>	Post Neonatal <sup>3</sup>
White	9.4	9.5	3.3
Non-white	16.9	15.8	7.5

<sup>1</sup> The fetal death rate is the number of nonabortion fetal deaths after 20 weeks gestation per 1000 live births plus fetal deaths.

<sup>2</sup> The neonatal death rate is the number of deaths from birth to 28 days per 1000 live births.

<sup>3</sup> The post neonatal death rate is the number of deaths from 29 days to 1 year per 1000 live births that attained the age of 29 days. This is a four year rather than a five year measure.

(Source: "Maternal and Child Care Statistics in North Carolina over the last Decade, "North Carolina Department of Human Resources, Spring 1981.)

74. The birth weight and infant death rate by race for the following North Carolina counties is as indicated below.

#### 1975-1979 Five Year Rate

	Percent Above 2501g <sup>1</sup> at birth		Fetal Death <sup>2</sup>		Neonatal <sup>3</sup> Death		Post Neonatal <sup>4</sup> Death	
	White	Non-W	White	Non-W	White	Non-W	White	Non-W
Mecklenburg	94.1	86.6	7.9	15.7	9.0	19.5	3.0	5.9
Forsyth	94.0	87.2	9.0	15.0	9.7	16.2	2.5	4.6
Durham	94.4	86.6	6.7	17.8	7.2	14.5	2.1	6.8
Wake	94.1	86.7	9.1	15.5	8.0	15.9	2.8	6.8
Wilson	94.4	86.2	8.8	22.3	11.4	16.3	3.2	8.8
Edgecombe	93.5	86.9	7.7	13.5	7.7	14.8	2.8	6.9
Nash	94.8	89.2	11.0	17.8	6.6	18.1	2.8	9.1

<sup>1</sup> It is considered healthy for a baby to weigh more than 2501 grams at birth. 2501 grams is 5.5 lbs.

<sup>2</sup> The fetal death rate includes deaths after 20 weeks of gestation excluding abortions.

<sup>3</sup> The neonatal death rate includes deaths from birth to 28 days.

<sup>4</sup> The post-neonatal death rate includes deaths from 29 days to one year.

(Source: "Maternal and Child Health Statistics, "North Carolina Department of Human Resources, 1979.

75. The death rate for non-whites in North Carolina is higher than the death rate<sup>1</sup> for whites.<sup>2</sup> For example, the age-adjusted mortality rate for 1978 was:

	White	Non-white
male	916.9	1192.5
female	453.7	621.8

<sup>1</sup> Deaths per 100,000 population adjusted for age.

<sup>2</sup> North Carolina mortality rates for years during the decade from 1970 to 1980 are not completely accurate. Because minorities were undercounted in North Carolina in the 1970 census, projections for minority populations for years between 1970 and 1980 were based on an inaccurately low estimate of the minority population and resulted in high estimate of the death rate. For example, death rate figures for 1980 based on the 1980 census are 1.6% lower for whites and 6.2% lower for blacks than death rates for 1980 based on projections from the 1970 census.

76. From 1978 to 1979 the North Carolina death rate decreased by five percent for non-white females, by four percent for non-white males, by one percent for white males, and by one percent for white females.

77. The following table shows life expectancy in 1973 and 1974.

Selected Life Table Values, by Age, Color and Sex:  
North Carolina, 1973 and 1974

Value	Total	White		Non-White	
		Male	Female	Male	Female
Expectation of Life:					
at Birth					
1973	68.90	66.68	74.70	59.06	67.56
1974	69.87	67.54	75.44	60.13	69.04
At Age 1					
1973	69.32	66.91	74.88	59.86	68.32
1974	70.16	67.77	75.40	60.74	69.59
At Age 25					
1973	46.64	44.37	51.67	37.92	45.43
1974	47.30	44.99	52.14	38.48	46.67
At Age 65					
1973	13.95	12.32	15.88	11.61	13.95
1974	14.23	12.56	16.97	11.89	14.49
Percent Surviving from Birth:					
To Age 1					
1973	97.97	98.19	98.44	97.04	97.45
1974	98.19	98.20	98.75	97.38	97.79
To Age 25					
1973	95.69	95.49	97.21	92.79	95.56
1974	96.21	95.99	97.59	93.74	95.96
To Age 65					
1973	68.61	63.17	82.03	44.99	65.05
1974	70.51	65.13	83.35	46.16	68.46

Median Age  
At Death:

1973	73.52	70.35	79.92	62.58	72.01
1974	74.40	71.03	80.34	63.17	73.51

Note: North Carolina mortality rates for years during the decade from 1970 to 1980 are not completely accurate. Because minorities were undercounted in North Carolina in the 1970 census, projections for minority populations for years between 1970 and 1980 were based on an inaccurately low estimate of the minority population and resulted in high estimate of the death rate. For example, death rates for 1980 based on projections from the 1970 census.

78. The following percentage of black and white students failed the North Carolina Competency Test in the fall of 1980, 1981, and 1982 (by school district). This chart reflects only the first time each student took the test; those who failed were given the opportunity to take the test again later.

	1980				1981				1982			
	B <sup>1</sup> Rdg	W Rdg	B Math	W Math	B Rdg	W Rdg	B Math	W Math	B Rdg	W Rdg	B Math	W Math
Mecklenburg	21%	2%	25%	3%	19%	2%	20%	3%	19%	2%	18%	3%
Forsyth	16%	2%	22%	3%	16%	2%	19%	3%	14%	2%	19%	4%
Durham Co.	16%	1%	21%	3%	15%	1%	18%	3%	10%	2%	18%	3%
Durham City	8%	7%	13%	8%	13%	0%	23%	4%	9%	4%	16%	2%
Wake	20%	2%	17%	3%	18%	2%	24%	2%	19%	1%	28%	3%
Wilson	25%	2%	30%	5%	25%	2%	27%	5%	15%	2%	23%	5%
Edgecombe	22%	4%	25%	7%	28%	3%	28%	7%	20%	3%	19%	5%
Tarboro City	25%	2%	38%	2%	17%	0%	19%	3%	20%	2%	26%	3%
Nash	18%	1%	22%	5%	22%	1%	28%	5%	16%	2%	18%	3%
Rocky Mount												
City	13%	0%	12%	1%	15%	2%	14%	3%	10%	1%	15%	3%
Halifax Co.	21%	4%	30%	0%	27%	9%	27%	10%	16%	5%	15%	5%
Roanoke												
Rapids	0%	1%	13%	1%	13%	3%	12%	3%	18%	2%	18%	2%
Weldon	25%	12%	33%	12%	14%	0%	20%	9%	9%	8%	34%	15%
Northampton	16%	0%	25%	6%	20%	5%	28%	6%	20%	3%	25%	2%
Hertford	20%	2%	22%	5%	19%	1%	17%	6%	17%	3%	17%	1%
Gates	29%	0%	25%	0%	10%	0%	14%	0%	8%	0%	11%	0%
Martin	24%	2%	26%	3%	22%	3%	24%	6%	16%	3%	23%	6%
Bertie	25%	8%	31%	9%	24%	8%	23%	8%	19%	6%	14%	6%
Washington	25%	0%	39%	3%	23%	11%	30%	5%	20%	4%	24%	10%
Chowan	18%	2%	25%	4%	31%	6%	28%	4%	18%	1%	20%	4%

<sup>1</sup> B = Black; W = White; Rdg = Reading.



79. The following table reflects the gains in reading for North Carolina students between 1977 and 1982 based on the annual testing program as shown for black students and for all North Carolina students.

North Carolina Average	Scale Scores
------------------------	--------------

Grade 3—5.1% gain over 1977-1982, from 391 to 411
Grade 6—4.7% gain over 1977-1982, from 489 to 512
Grade 9—3.0% gain over 1977-1982, from 562 to 579

Black North Carolina Students' Average

Grade 3—7.7% gain over 1977-1982, from 362 to 390
Grade 6—6.9% gain over 1977-1982, from 448 to 479
Grade 9—4.7% gain over 1977-1982, from 507 to 531

80. In 1980 76% of the high school seniors who were awarded certificates instead of diplomas were black. (A certificate means the student completed all requirements for graduation but did not pass both parts of the competency test.) There were a total of 1,193 students awarded certificates: 984 black, 288 white; and 21 others. This number represents 1.82% of all high school seniors who neither withdrew nor were retained. (The racial composition and number of seniors who withdrew or were retained is not available.)

Of those receiving certificates, some were handicapped. The type of handicap by ethnic origin is as follows:

Type of Handicap	Ethnic Group					
	Black		White		Other	
		%		%		%
Not handicapped	314	24.3	61	4.7	5	.3
Multiple handicapped	12	.9	12	.9	2	.2
Educable mentally handicapped	612	47.3	191	14.8	7	.5
Hearing impaired			1			
Visually impaired			1			
Learning disabled	28	2.2	16	1.2		
Other handicap	18	1.4	6	.5	7	.5
	76.1%		22.3%		1.6%	

81. Black adults have fewer years of education than do white adults. The following chart shows the percent of the black/white adults 25 years old and over by the number of years of education completed.

	Black	White
Elementary (0-8 yrs.)	34.6%	22.0%
High School (1-3 yrs.)	22.4%	20.0%
High School (4 yrs.)	25.7%	28.4%
College (1-3 yrs.)	10.0%	14.7%
College (4 or more yrs.)	7.3%	14.6%

82. Between 1970 and 1980, the percentage of black adults 25 years of age or older, who had completed at least four years of high school or education beyond high school increased from 22.9% to 43%, an increase of 87.8%. The increase in white adults with at least four years of high school or education beyond high school, during the period from 1970 to 1980, was from 42.2% to 57.7%, a 36.7% increase.

83. A higher percent of black households in North Carolina rent their homes and live in substandard or overcrowded housing than of white households. The following

chart shows the percent of each race which falls in each category according to the North Carolina Citizen's Survey (1979).<sup>3</sup>

	Percent Buying	Percent Renting	Percent Over- crowded <sup>1</sup>	Percent Inadequate Plumbing <sup>2</sup>
White	80.8 <sup>4</sup>	16.8	2.4	0.7
Black	55.0 <sup>4</sup>	41.5	12.0	8.5
Other	71.4	23.8	14.3	9.6
Whole State	75.6	21.7	4.4	2.2

<sup>1</sup> Overcrowding is defined as more than one person per room.

<sup>2</sup> Inadequate plumbing is defined as no plumbing or lacking at least one of hot and cold piped water, flush toilet, and bathtub or shower.

<sup>3</sup> Between 1970 and 1980 according to census figures, the percentage of blacks in owner occupied housing units increased from 45.5% to 50.9%, an increase of over 5% of the black population and an increase of more than 10% above the proportion in owner occupied housing units in 1970. During this same period, whites in owner occupied housing units increased from 70.0% to 72.8%, an increase of 2.8% of the white population and an increase of 4% of the proportion in owner occupied housing in 1970.

<sup>4</sup> The figures in the 1979 North Carolina Citizen's Survey show a higher percentage of whites and blacks in owner-occupied housing than the 1979 figures from the 1980 Census. In the Citizen's Survey, 25.5% of the respondents were in the 18-29 age group compared to 32% estimated in that age group by the Division of State Budget and Management and 31.4% estimated by the March 1979 Current Population Survey. Of 1,389 respondents to the Citizens Survey, the raw figures show between 1,103 and 1,105 whites, and 250 to 279 non-whites answering the housing questions.

84. In the Spring of 1981, the North Carolina Housing Finance Agency, the United States Secretary of Housing

and Urban Development, and the United States Secretary of the Treasury identified 24 urban census tracts which were eligible for loans under the Mortgage Subsidy Bond Tax Act. The criterion is that 70% or more of the families have income which are 80% or less of the statewide median family income. Of the 48,562 people living in these census tracts 39,369 (81%) were black compared to 8,814 (18%) white and 174 (.6%) indian. The tracts eligible for targetting are as follows:

Table 10  
NORTH CAROLINA CENSUS TRACTS ELIGIBLE FOR TARGETING

County No.	Tract	County	1980 Total Pop.	White	Black	American Indian
21	2.00	Buncombe	2173	557	1608	7
51	1.00	Cumberland	1005	441	523	34
51	2.00	Cumberland	2787	487	2249	48
51	3.00	Cumberland	1482	449	958	0
51	13.00	Cumberland	2269	77	2186	2
63	12.01	Durham	864	0	859	0
63	12.02	Durham	976	1	975	0
65	201.00	Edgecombe	401	34	367	0
67	6.00	Forsyth	2718	23	2689	4
67	8.02	Forsyth	3065	710	2309	17
81	108.01	Guilford	703	459	221	14
119	4.00	Mecklenburg	623	338	281	3
119	6.00	Mecklenburg	1901	66	1825	3
119	7.00	Mecklenburg	757	90	665	0
119	8.00	Mecklenburg	3346	95	3246	0
119	37.00	Mecklenburg	2562	6	2547	0
119	49.00	Mecklenburg	215	0	215	0
129	111.00	New Hanover	3755	132	3607	12
129	113.00	New Hanover	1381	1024	351	5
129	114.00	New Hanover	1675	5	1665	4
189	9.00	Wake	4033	118	3904	5
191	10.00	Wanye	3007	2658	337	4
191	17.00	Wanne	567	271	268	1
195	8.00	Wilson	6297	773	5514	4
24 Census Tracts			48562	8814	39369	174



85. In *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), the United States Supreme Court affirmed the decision of the North Carolina Supreme Court which upheld the use of the literacy requirement for voting in North Carolina. In *Bazemore v. Bertie County Board of Elections*, 254 N.C. 398 (1961), the North Carolina Supreme Court struck down the practice of requiring registrants to write the North Carolina Constitution from dictation but upheld the requirement of ability to read and write the North Carolina Constitution to be administered to all applicants of uncertain ability. Use of the literacy requirement in North Carolina did not totally cease until 1970.

86. In 1970, a referendum was submitted to the voters of North Carolina to amend the constitution of North Carolina to delete the literacy requirement for voting. Of the proposed constitutional amendments before the voters at that time, the amendment to delete the literacy requirement was the only one defeated. The amendment was defeated in each of the following counties: Mecklenburg, Forsyth, Durham, Wake, Wilson, Edgecombe, Nash, Halifax, Northampton, Hertford, Gates, Martin, Bertie and Washington. The literacy requirement is currently N.C.G.S. § 163-58 and Article VI § 3 of the North Carolina Constitution but is not currently enforced.

87. N.C.G.S. § 163-67(a) provides that "No person shall be registered to vote without first making a written, sworn and signed application to register upon the form prescribed by the State Board of Elections. If the applicant cannot write because of physical disability, his name shall be written on the application for him by the election official to whom he makes application, but the specific reason for the applicant's failure to sign shall be clearly stated upon the face of his application."

88. Since 1915 North Carolina has had a majority vote requirement for party primaries. The first majority vote

requirement was enacted at the same time as the initial enactment of the primary election on method of nomination of candidates. It currently is contained in N.C.G.S. § 163-111 and reads as follows:

(a) **Nomination Determined by Majority; Definition of Majority.**—Except as otherwise provided in this section, nominations in primary elections shall be determined by a majority of the votes cast. A majority within the meaning of this section shall be determined as follows:

- (1) If a nominee for a single office is to be selected, and there is more than dividing the total vote cast for all aspirants by two. Any excess of the sum so ascertained shall be a majority and the aspirant who obtains a majority shall be declared the nominee.
- (2) If nominees for two or more offices (constituting a group) are to be selected, and there are more persons seeking nomination than there are offices, the majority shall be ascertained by dividing the total vote cast for all aspirants by the number of positions to be filled, and by dividing the result by two. Any excess of the sum so ascertained shall be a majority, and the aspirant who obtains a majority shall be declared the nominee.

(b) **Right to Demand Second Primary.**—If an insufficient number of aspirants receive a majority of the votes cast for a given office or group of offices in a primary, a second primary, subject to the conditions specified in this section, shall be held:

- (1) If a nominee for a single office is to be selected and no aspirant receives a majority of the votes cast, the aspirant receiving the highest number



of votes shall be declared nominated by the appropriate board of elections unless the aspirant receiving the second highest number of votes shall request a second primary in accordance with the provisions of subsection (c) of this section. In the second primary only the two aspirants who received the highest and next highest number of votes shall be voted for.

- (2) If nominees for two or more offices (constituting a group) are to be selected and aspirants for some or all of the positions within the group do not receive a majority of the votes, those candidates equal in number to the positions remaining to be filled and having the highest number of votes shall be declared the nominees unless some one or all of the aspirants equal in number to the positions remaining to be filled and having the second highest number of votes shall request a second primary in accordance with the provisions of subsection (c) of this section. In the second primary to select nominees for the positions in the group remaining to be filled, the names of all those candidates receiving the highest number of votes and all those receiving the second highest number of votes and demanding a second primary shall be printed on the ballot.

89. North Carolina has never had a majority-vote requirement for general elections.

90. In 1983, Representative Kenneth Spaulding, black, introduced legislation, HB 171, to reduce the majority vote requirement to 40% for primaries for the U.S. Senate, congressional seats, state-wide offices, the General Assembly and judgeships. This bill was defeated in the House Election Laws Committee. Later in the 1983 Session, after

the defeat of HB 171, Representative Spaulding introduced HB 536 to reduce the majority vote requirement to 41% for primaries as long as the leading candidate obtained at least 3% more of the votes than the next highest votegetter. This bill was defeated in the House Election Laws Committee.

91. North Carolina enacted an anti-single shot voting law for local elections in specified counties and municipalities in 1955. It was enforced until it was declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F.Supp. 206 (EDNC 1972). It has not been enforced since 1972. At least since 1915, North Carolina has not had an anti-single shot provision for nomination or election of candidates for the North Carolina General Assembly.

92. North Carolina enacted a numbered seat requirement for specified legislative multi-member districts in 1967. The provision was modified and re-enacted when the General Assembly was reapportioned in 1971. It was declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F.Supp 206 (EDNC 1972), primarily on the ground that it did not apply statewide. Numbered seat requirements prevent single shot voting.

93. North Carolina has not had a numbered seat plan for election of legislators since 1972.

94. At least since 1950, North Carolina has not had any statutory or regulatory provisions for slating of candidates in any county or district with any significant concentration of minority votes. (There have, during this period, been some provisions for nomination by convention from some western counties with a very low percentage of minority votes.)

95. By district, the following number of black members have served in the General Assembly:

## JA-94

District (Number of Seats)	69	71	73	75	77	79	81	83
Mecklenburg House (8)	0	0	0	0	0	0	0	1
Mecklenburg/Cabarrus Senate (4)	0	0	0	1	1	1	0	0
Forsyth House (5)	0	0	0	1	1	1*	0	2
Forsyth Senate (2)	0	0	0	0	0	0	0	0
Durham House (3)	0	0	1	1	1	1	1	1
Durham Senate (2)	0	0	0	0	0	0	0	0
Wake House (6)	0	0	0	0	0	0	1	1
Wake Senate (3)	0	0	0	1	1	0	0	0
Wilson/Edgecombe/Nash House (4)	0	0	0	0	0	0	0	0
Senators from counties in Senate District #2 (1)	0	0	0	0	0	0	0	0
Representatives from counties in Senate District #2	0	0	0	0	0	0	1	2**

\*Appointed mid-term

\*\*Both elected from majority black districts

96. No black person was elected to the North Carolina General Assembly from 1900 until 1969 when one black representative was elected. No black person was elected to the Senate until 1975 when two black senators were elected. The number and percent of black members serving in the General Assembly since 1969 is as follows:

## JA-95

Term	House (Number followed by Percent)	Senate (Number followed by Percent)
1969-70	1 (.8%)	0
1971-72	2 elected and 1 appointed mid-term (2.5%)	0
1973-74	3 (2.5%)	0
1975-76	4 (3.3%)	2 (4%)
1977-78	4 (3.3%)*	2 <sup>1</sup> (4%)
1979-80	3 elected and 1 appointed mid-term (3.3%)	1 (2%)
1981-82	3 (3.5%)	1 (2%)
1983-84	11 (9.2%)*	1 (2%)*

<sup>1</sup> One black senator resigned midterm and a black person was appointed to that seat.

\* Three blacks resigned midterm and were replaced by black members.

<sup>2</sup> Five representatives and the senator (or one half) were elected from districts which are majority black. Five representatives were elected at large from majority white multimember districts which are not covered by § 5 of the Voting Rights Act. Prior to 1982 all districts were majority white and all elections were at large.

97. The following are the only black people to serve in the North Carolina General Assembly this century:

Session	Name	Party-County	District	Terms
1969-70	Henry E. Frye	D-Guilford	26th House	1969-70
1971-72	Henry E. Frye	D-Guilford	26th House	1971-72
	Joy J. Johnson	D-Robeson	24th House	1971-72
	Alfreda Webb <sup>1</sup>	D-Guilford	26th House	1971-72
1973-74	Henry E. Frye	D-Guilford	23rd House	1973-74
	Joy J. Johnson	D-Robeson	21st House	1973-74
	Henry M. Michaux, Jr.	D-Durham	16th House	1973-74



Session	Name	Party-County	District	Terms
1975-76	Fred D. Alexander	D-Mecklenburg	22nd Senate	1975-76
	John W. Winters	D-Wake	14th Senate	1975-76
	Richard C. Erwin	D-Forsyth	29th House	1975-76
	Henry E. Frye	D-Guilford	23rd House	1975-76
	Joy J. Johnson	D-Robeson	21st House	1975-76
	Henry M. Michaux, Jr.	D-Durham	16th House	1975-76
1977-78	Fred D. Alexander	D-Mecklenburg	22nd Senate	1977-78
	John W. Winters	D-Wake	14th Senate	1977*
	Clarence E. Lightner <sup>2</sup>	D-Wake	14th Senate	1977-78
	Richard C. Erwin	D-Forsyth	29th House	1977-78
	Henry E. Frye	D-Guilford	23rd House	1977-78
	Joy J. Johnson	D-Robeson	21st House	1977-78
	Henry M. Michaux, Jr.	D-Durham	16th House	1977
	A.J. Howard Clements <sup>3</sup>	D-Durham	16th House	1977-78
	Howard L. Kennedy, Jr. <sup>4</sup>	D-Forsyth	29th House	1978
	Robert E. Davis <sup>5</sup>	D-Robeson	21st House	1978
1979-80	Fred D. Alexander	D-Mecklenburg	22nd Senate	1979-80
	Robert E. Davis	D-Robeson	21st House	1979-80
	Henry E. Frye	D-Guilford	23rd House	1979-80
	Kenneth B. Spaulding	D-Durham	16th House	1979-80
	Anne B. Kennedy <sup>6</sup>	D-Forsyth	29th House	1979-80
	Rowe Motley	D-Mecklenburg	22nd Senate	1980
1981-82	Henry E. Frye	D-Guilford	19th Senate	1981-82
	Dan T. Blue, Jr.	D-Wake	15th House	1981-82
	Kenneth B. Spaulding	D-Durham	16th House	1981-82
	C. Melvin Creecy	D-Northampton	5th House	1981-82
1983-	William N. Martin	D-Guilford	31st Senate	1983
	Frank W. Balance, Jr.	D-Warren	7th House	1983
	Phillip O. Berry	D-Mecklenburg	36th House	1983
	Dan T. Blue, Jr.	D-Wake	21st House	1983
	C. Melvin Creecy	D-Northampton	5th House	1983
	C.R. Edwards	D-Cumberland	17th House	1983
	Herman C. Gist	D-Guilford	26th House	1983
	C.B. Hauser	D-Forsyth	39th House	1983
	Luther R. Jerald	D-Cumberland	17th House	1983
	Annie Kennedy Brown	D-Forsyth	39th House	1983
	Sidney A. Locks	D-Robeson	16th House	1983
	Kenneth B. Spaulding	D-Durham	23rd House	1983

<sup>1</sup> Webb was appointed December 31, 1971, to replace McNeil Smith (Guilford).

<sup>2</sup> Lightner was appointed on August 3, 1977, to replace John W. Winters (Wake County).

<sup>3</sup> Clement was appointed on August 3, 1977, to replace Henry M. Michaux, Jr. (Durham County).

<sup>4</sup> Kennedy was appointed February 9, 1978, to replace Richard C. Erwin (Forsyth County).

<sup>5</sup> Davis was appointed February 17, 1978, to replace Joy J. Johnson (Robeson County).

<sup>6</sup> Kennedy was appointed October 19, 1979, to replace Judson DeRamos (Forsyth County).

<sup>7</sup> Motley was appointed in April, 1980, to replace Fred Alexander (Mecklenburg County).

General Note on Term of Office: Article II, Section 9 of the Constitution of North Carolina sets the terms of office for Legislators. Prior to 1983, this commenced "at the time of their election". In 1982, a constitutional amendment was approved setting "the first day of January next after their election," as the starting date.

98. North Carolina General Statutes § 163-11 provides the mechanism for filling a vacancy in the General Assembly. Between 1967 and 1973, the Governor was required to appoint for the remainder of the term the person elected by the County Executive Committee of the political party with which the vacating member was affiliated when elected from the county in which the vacating member resided. In 1973, the provision was amended to provide that, in the case of a multi-county district, the Governor should appoint the person recommended by the district House of Representatives or senatorial committee of the political party with which the vacating member was affiliated when elected. Members of the respective district committees were chosen by the county conventions or county executive committees of each political party, with at least



one member from each county within the district, with votes on the committee based on population of the respective counties. The provision has since been amended to provide further adjustments in situations in which part of a county is included within a district.

99. Of 299 clerical and non-professional workers, other than pages appointed for one week's service, employed by the General Assembly for the week ending February 4, 1983, 24 (8.0%) have been identified by Mr. George R. Hall, Jr., Legislative Services Officer, to be black. (Records are not kept on the race of employees of the General Assembly.) Of these 24, 9 are housekeepers, 11 are secretaries to the black Representatives and Senator, 3 are on the Sergeant-of-Arms staff, and 1 is on the House Clerk's staff. 170 of the 299 clerical and non-professional workers other than pages are personal secretaries to the individual representatives and senators. Each senator and representative selects his or her personal secretary.

100. No black person has been elected to statewide office in North Carolina or to the United States Congress from North Carolina since 1900 with the exception of Clifford Johnson who was elected as a Superior Court Judge in 1978, Richard Irwin who was elected to the Court of Appeals in 1978, and Charles Becton who was elected to the Court of Appeals in 1982. Each of these was elected to fill a seat to which he had previously been appointed.

101. All judges who were appointed were appointed by the Governor in office at that time. Special Superior Court Judges are appointed by the Governor for four year terms and do not run for election at any time. There are eight Special Superior Court Judges. All other judicial positions are normally filled by election, including Supreme Court Justices, Judges of the Court of Appeals, Resident Superior Court Judges, and District Court Judges, although initially a judge may take office by gubernatorial appointment to fill a vacancy in office.

102. There were no black judges in North Carolina before 1968. Since 1968 the following number and percent of judges in North Carolina have been black:

	<i>District</i>	<i>Resident Superior</i>	<i>Special Superior</i>	<i>Court of Appeals</i>	<i>Supreme Court</i>
1968	1/112(0.9%)	0/41	0/8	0/12	0
1970	1/112(0.9%)	0/41	0/8	0/12	0
1972	2/112(1.8%)	0/41	1/8(12.5%)	0/12	0
1974	4/118(3.4%)	0/42	1/8(12.5%)	0/12	0
1976	5/118(4.29%)	0/47	1/8(12.5%)	0/12	0
1978	6/124(4.8%)	1/58(1.7%)	1/8(12.5%)	1/12(8.3%)	0
1980	9/124(7.3%)	1/58(1.7%)	0/8	1/12(8.3%)	0
1982	11/124(9.1%)	1/58(1.7%) <sup>1</sup>	2/8(25%)	2/12(16.7%)	0
1983	12/124(9.7%)	0/58	2/8(25%)	2/12(16.7%)	1/7(14.2%)

<sup>1</sup> Judge Johnson stopped serving as a Superior Court Judge in 1982 when appointed to the Court of Appeals. He is counted in both places on this chart.

<sup>2</sup> There is no official record of the number of black lawyers in North Carolina but the North Carolina Association of Black Lawyers has identified approximately 350. This is an underestimate of the actual number but is approximately 4% of all lawyers in North Carolina.

103. Exhibit SS is a list of black candidates who ran for the North Carolina House of Representatives or Senate since 1970 with success in Primary and General Elections indicated.

104. North Carolina has 100 counties. They range in black population from 0.1% to 60.7%. Each has between three and seven county commissioners. Exhibit MM is a list of all known black County Commissioners in North Carolina.

105. Exhibit NN is a publication by the Institute of Government of the University of North Carolina entitled

"Form of Government of North Carolina Counties" (1981 Edition), giving county population, form of government, and method of selecting the governing body.

106. There are 17 municipalities with a population over 25,000 in North Carolina; 25 municipalities with a population between 10,000 and 25,000; 28 municipalities with a population between 5,000 and 10,000; 67 municipalities with a population between 2,500 and 5,000; 109 municipalities with a population between 1,000 and 2,500; 112 municipalities with a population between 500 and 1,000; and an unknown number of towns or villages with a population less than 500.

107. Exhibit OO is a publication by the Institute of Government of the University of North Carolina of Chapel Hill, entitled "Form of Government of North Carolina Cities" (1981 Edition), giving North Carolina cities by size and providing information such as county of location, form of government, type and selection of governing body, for all known North Carolina municipalities with populations of 500 or more.

108. Exhibit PP is a list of all known black mayors in North Carolina as of May, 1983. Exhibit QQ is a list of all known black city council members in North Carolina as of May, 1983.

109. Prior to 1969 the State Board of Elections had no black members. For each year since 1969, the North Carolina State Board of Elections has had at least one black member, out of the total of five members. Since October, 1981, the State Board of Elections has had two black members. Black members serving on the Board of Elections during the period from 1969 through the present are as follows:

L. H. Jones, 1969-1977  
Dr. Sidney Y. Barnwell, 1977-1981

William Marsh, 1981—still serving on the Board  
Elloree Erwin, 1981—still serving on the Board

(Elloree Erwin is a Republican. The rest are Democrats.)

110. Mecklenburg County (House District #36) can be divided into eight single-member House districts with two and only two districts over 65% black in population.

111. At its February, 1982 Session, the North Carolina House of Representatives had available to it the proposal of the North Carolina Association of Black Lawyers, a proposal presented by Representative Hege, (R-Davidson County) and a staff drawn plan, each of which contained two single-member districts in Mecklenburg County which were majority black in population. The plan developed by the member of the legislative staff included a district which was 66.1% black in population and a district which was 71.2% black in population.\*

112. The Mecklenburg/Cabarrus County Senate district (Senate District #22) can be divided into four single member districts with one of the districts over 65% black in population.\* Only one majority black Senate district with a black population over 65% can be drawn.

113. In February, 1982, the General Assembly had before it the plan of the Black Lawyers Association and the plan presented by Senator Ballenger (R-Catawba County) each of which created a single-member Senate district wholly within Mecklenburg County which was over 60% black in population. In addition, a member of the legislative staff developed a single-member district in Mecklenburg County which was 70.77% black in population.\*

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.



114. If Mecklenburg County were divided into single-member districts, for either the House or Senate, it would be the first division of that county for legislative districts.

115. The 1966 and 1971 plan for election of members to the General Assembly placed Mecklenburg County in an eight-member House of Representatives district consisting solely of Mecklenburg County. No black person was elected as a Representative from that district from 1966 through 1981. During that period seven black people ran for the House of Representatives.

116. The House district consisting of Mecklenburg County was not changed in the 1982 apportionment. In the 1982 general election, Mecklenburg County elected eight members of the North Carolina House for 1983-1984. One of those members, Phillip O. Berry is black. James D. Richardson, who is also black, ran but was not elected. He came in ninth.

117. The 1971 plan for election of members to the General Assembly placed Mecklenburg County in a four-member Senate District consisting of Mecklenburg and Cabarrus Counties. No senator from Mecklenburg County was black until 1975. Fred D. Alexander, who was black and was from Mecklenburg County ran for the Senate but was defeated in 1972. He was elected to the North Carolina Senate from that district for the 1975-76, and 1977-78, and 1979-80 General Assemblies. Alexander filed for reelection in 1980, but died before the primary was held. When Alexander died, Rowe Motley, who is black, was appointed by the Governor to fill Alexander's unexpired term. Alexander's name could not be removed from the primary election ballot. Alexander lost the primary.

118. Mecklenburg and Cabarrus County elected four members to the Senate in 1982. James Polk, who is black, ran as a Democrat but was defeated in the General Election, running fifth.

119. Mecklenburg County has a five-member Board of County Commissioners, all of whom are elected-at-large. Currently, one of those five members, Robert L. Walton, is black. Walton was first elected in 1976. In 1978 he was defeated in his bid for reelection. Walton was elected in 1980 and 1982.

120. Mecklenburg County has never had a black Sheriff. It has a black VAP of 24%.

121. Clifton E. Johnson, who is black, was appointed to the North Carolina Court of Appeals in 1982, where he is currently serving. Johnson was appointed to the District Court for Mecklenburg County in 1969 and was subsequently elected and reelected to that position. He was appointed by the Governor to be a Resident Superior Court Judge from Mecklenburg County in 1978, having been nominated by voters in the Mecklenburg County primary and elected by statewide vote in the general election. He ran unopposed in that election. Johnson was the first and only black resident Superior Court Judge from Mecklenburg County of five Resident Superior Court Judges. He is the only black ever to serve as a Resident Superior Court Judge in North Carolina. He served in that role until his appointment to the North Carolina Court of Appeals. At the time Johnson was appointed to the Court of Appeals, Yvonne Mims Evans, a black attorney, sought to fill the Superior Court vacancy, but the Mecklenburg County Democrat Party Executive Committee selected a white nominee instead, and the white nominee was appointed by the Governor. There are currently no black Resident Superior Court Judges.

122. Mecklenburg County is a single-member Judicial District, which elects ten District Court Judges. Currently, two of those judges, T. Michael Todd, and Terry Sherrill are black. Todd was appointed in 1979 and elected in 1980. He came in third in the vote of the Mecklenburg



County Bar for nominations for the seat. He came in behind two white candidates. Todd was, nonetheless, appointed by the Governor. Terry Sherrill came in third in the vote of the Mecklenburg County Bar behind two white candidates and was appointed by the Governor in 1983.

123. The Charlotte-Mecklenburg Board of Education has nine members elected at large to four-year terms on a staggered schedule. Currently, two of those members, Sarah Belle Stephenson and George E. Battle, Jr., are black. Stephenson was elected in 1980 for the first time. Battle was elected in 1978 for the first time and was re-elected in 1982. Until his resignation to run for a House seat in the North Carolina General Assembly, Phillip O. Berry, who is black, was chairman of the Board, serving along with Stephenson and Battle. Berry was first elected to the Board in 1976 and was re-elected in 1980. Of six or more persons seeking to replace Berry upon his resignation, a white person was selected by the remaining Board members although Arthur Griffin, who is black, sought the position.

124. Exhibit RR is an accurate list of black candidates who have run for countywide office in Mecklenburg County or in municipal elections for the City of Charlotte since 1964.

125. The Mecklenburg County Board of Elections has three members. From March 2, 1970, until his death in May of 1972, Mr. Walter B. Nivens served on that Board, and was Chairperson from March of 1972, until his death. Jack Martin also served on the Mecklenburg County Board of Elections from July 13, 1972, through March of 1974, serving as Chairperson for a part of that time. Phyllis Lynch has served on the Mecklenburg County Board of Elections since June of 1977 through the present and has been Chairperson since June of 1981 through the present. Nivens, Martin and Lynch are black and are the

only black people who have served on the Mecklenburg County Board of Elections.

126. The immediate Past Chairman of the Mecklenburg County Democratic Executive Committee, for the term from 1981 through May 1983, was Robert Davis, who is black. Davis is the only black person ever to hold that position.

127. The City of Charlotte, located in Mecklenburg County, has a total population of 314,447 according to 1980 census figures. 31% of the population and 20.6% of the registered voters in Charlotte are black.

128. The Charlotte City Council has eleven members, seven elected from Districts and four elected at large. Of the current members, Charles Dannelly and Ronald Leeper, both elected from majority black districts, and Harvey Gantt, elected at large, are black. Gantt was first elected to the City Council in 1975, and re-elected in 1977. He was elected to the City Council again in 1981. He is currently Mayor Pro-Tem of Charlotte. Gantt did not run for City Council in 1979 because he ran for Mayor. He was defeated by a white candidate in the Democratic Primary. Dannelly and Leeper were both first elected in 1977 and re-elected in 1979 and 1981.

129. The portion of Forsyth County which is in House District 39 can be divided into five single-member districts. Either one district over 65% black can be formed or two majority black districts can be formed.\*

130. In February, 1982, the General Assembly had available to it the plan of the Black Lawyers Association and a plan presented by Representative Hege (R-Davidson), each of which contained a single member district wholly

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

within Forsyth County which was over 80% black in population. In addition, a member of the legislative staff had developed a single-member district in Forsyth County which was 70.00% black in population.\*

131. It is not possible to draw a majority-black single-member Senate district in Forsyth County.

132. In the 1982 General Elections for members of the North Carolina General Assembly, District thirty-nine elected five Representatives of whom two, C. B. Hauser and Annie Brown Kennedy, are black. District 39 consists solely of Forsyth County, not including two townships of Forsyth County placed in District 29.

133. Richard C. Erwin, who is black, was elected as a member of the North Carolina House of Representatives from Forsyth County for 1975-76 and 1977-78. He resigned from the General Assembly upon his appointment as a Judge of the North Carolina Court of Appeals in 1977, to which he was elected in 1978, and where he continued to serve until his appointment in October 1980 as a United States District Court Judge for the Middle District of North Carolina. Erwin, one of twelve Court of Appeals Judges, was the first black to serve on the Court of Appeals when he was appointed in 1977.

134. Harold L. Kennedy, Jr., was appointed February 9, 1978, to replace Richard C. Erwin in the North Carolina General Assembly upon Erwin's appointment to the North Carolina Court of Appeals. Kennedy is black and is from Forsyth County. Kennedy ran for re-election to the House of Representatives in 1978 and lost.

135. On October 19, 1979, Annie B. Kennedy, who is black, was appointed to replace Judson DeRamus, who

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

is white, as a member of the North Carolina House of Representatives from Forsyth County. Kennedy ran for re-election in 1980 and lost; she ran in 1982 and won.

136. The Forsyth County Board of County Commissioners has five members elected at large. Currently, that Board has one black member, Mazie Woodruff. When elected in 1976, she was the first black member of the Forsyth County Board of County Commissioners. Forsyth County elects Commissioners for four year terms. Woodruff ran again in 1980 and was defeated by a white candidate. She ran again in 1982 and was elected.

137. Forsyth County has never had a black Sheriff. The Voting Age Population of Forsyth County is 22% black.

138. James Arthur Beaty, Jr., a black resident of Forsyth County, was appointed by the Governor as a special Superior Court Judge in 1981.

139. The Forsyth County School Board has eight members elected at-large. Beauford Bailey, who is black, is currently a member of that Board. Thirty seven percent of the student enrollment of the Forsyth County Public Schools is black. The population of Forsyth County is 24% black.

140. In Forsyth County there has been no black chairman of the Democratic Party.

141. The Forsyth County Board of Elections has three members. H. B. Goodson, who is black, served on that Board from 1973 until 1979. Joan Cardwell, who is also black, has served on that Board from 1979 through the present and is Secretary.

142. The City of Winston Salem, located in Forsyth County, has a total population of 131,885 according to 1980 census figures. 40.16% of the population and 31.9%



of the registered voters in the City of Winston Salem are black.

143. The Winston-Salem City Council has eight members elected from wards in addition to the mayor. Currently there are four black members on the Council. Larry Little, Vivian Burke, Virginia Newell, and Larry Womble. Little, Burke, and Newell were all elected in 1977 and re-elected in 1981 from majority black wards. Womble was first elected in 1981 by defeating an incumbent white Democrat in the primary and a white Republican in the general election. His ward has 4,536 white registered voters, 2,893 black registered voters, and three of other races. Prior to 1977, C. C. Ross, Carl Russell, and Richard Davis, all black, were elected in 1970 and 1974 from majority black wards. (The election schedule was changed from even to odd years between the 1974 and 1977 election.)

144. Durham County (House District #23) can be divided into three single member districts with one and only one of them over 65% black in population.\*

145. In February, 1982, the General Assembly had before it the Black Lawyers Association apportionment which contained a single member district in Durham County which was over 70% black in population and the proposal of Representative Hege, (R-Davidson County) which contained a single-member district within Durham County which was over 65% black in population. In addition, a member of the legislative staff has developed a single-member district for Durham County which was 70.91% black in population.

146. It is not possible to draw a majority-black single-member Senate district which is in Durham County or which includes substantial parts of Durham County.

\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

147. If Durham County were divided into single-member districts, for either House or Senate districts, the division of Durham County would be the first division of that county for legislative districts.

148. At all times since 1973, one of Durham County's three Representatives to the North Carolina House of Representatives has been black. Black members from Durham County during that period are as follows:

1. Henry M. Michaux, Jr.—elected to the 1973, 1975, and 1977 General Assemblies (resigned in 1977 to become United States Attorney for the Middle District of North Carolina).
2. A. J. Howard Clement, III, appointed to the expiration of Michaux's term in 1977 General Assembly. He ran for re-election in 1978 and 1982 and was defeated both times in the Democratic Primary.
3. Kenneth B. Spaulding—elected to terms in the 1979, 1981, and 1983 General Assemblies, where he continues to serve.

149. Prior to 1973 no black person was elected to the House of Representatives from Durham County and no black person has ever been elected to the Senate from Durham County.

150. The Durham County Board of County Commissioners has five members elected at large. No blacks served prior to 1967. The following black people have served on the Commission since 1969:

Asa T. Spaulding	1969-72
Nathan Garrett	1973-74
William V. Bell	1973-current
Edna Spaulding	1975-current



William V. Bell is currently Chairman of the Durham County Board of County Commissioners.

151. Durham County has never had a black Sheriff. Durham County has a black Voting Age Population of 33.6%.

152. Chales L. Becton, a black resident of Durham County, was appointed by the Governor to the North Carolina Court of Appeals as one of its twelve judges in 1981. He was elected by a statewide vote to that office in 1982 to fill the remainder of the term until 1984. Becton and four other incumbents ran unopposed in the 1982 election. Ten Democrats ran for the three other seats which were up for election in 1982 with no incumbents running.

153. Durham County is a single-county judicial district with four District Court Judges. Prior to 1977, none were black. In 1979, the Governor appointed William G. Pearson, who is black to be a District Court Judge. Pearson was elected in 1978 and in 1982. In 1979 the Governor appointed Karen Galloway, who is black, to be a District Court Judge. Galloway was elected in 1982.

154. The Durham County Board of Elections is a three-member board. From March 2, 1970, until June of 1981, William Marsh was a member of that board. Marsh, who is black, served as chairman for six years ending in 1979. Since 1981 there has not been a black member on the Board.

\* 155. The Chairmanship of the Durham County Democratic Party has been held by a black for approximately ten of the last fourteen years. Persons serving in the chairmanship during that period are as follows:

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

<i>Name</i>	<i>Beginning of Term</i>
* Lavonia Allison, B	1969 or 1970
Howard Clement, B	1974
Willie Lovett, B	1977
Barbara Smith, W	1979
Robert Sugg, W	1981
Jeanne Lucas, B	1983

Lavonia Allison was the first black chairman of the Durham County Democratic Party.

\* B—indicates black  
W—indicates white

156. The City of Durham, located in Durham County, has a total population of 100,538 according to corrected census figures. 47.08% of the population and 38.9% of the registered voters in the City of Durham are black.

157. The Durham City Council consists of twelve members, in addition to the mayor. Six are elected at large. Six are elected at large, but must reside in wards. Currently, the following three members are black: Ralph Hunt, representing a majority black ward; Chester L. Jenkins elected at large; and A. J. Howard Clement, appointed on May 16, 1983, to the expiration of Maceo K. Sloan's term. Sloan, who is also black, was elected at large and resigned April 18, 1983.

158. Wake County (House District #21) can be divided into six single member districts with one and only one of them over 65% black in population.\*

159. In February, 1982, the Legislature had available to it the proposal of the Black Lawyers Association which contained a single-member district in Wake County which

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

was over 65% black in population. In addition, a member of the legislative staff had prepared a single-member district for Wake County which was 68.5% black in population.\*

160. If Wake County were divided into single-member House districts, it would be the first division of that county for House districts. Wake County was divided the first time for Senate districts in 1982.

161. It is not possible to draw a single-member majority black Senate district which is in Wake County or includes substantial parts of Wake County.

162. Dan T. Blue, Jr., who is black, was elected as a member of the House from Wake County for the 1981-82 and 1983-84 General Assemblies. In the 1982 Democratic primary, Blue received the highest vote total of the fifteen Democrats running. In the 1982 general election, Blue received the second highest vote total of the seventeen candidates for six seats. Five of the seventeen candidates were Libertarians. All Democratic candidates won. Blue had run in 1978 as a Democrat and he lost in the primary.

163. John W. Winters, who is black, was elected as a Senator from Wake County for the 1975-76 and 1977-78 General Assemblies. Upon Winters' resignation, to accept an appointment as a member of the North Carolina Utilities Commission, Clarence E. Lightner, who is black, and is from Wake County, was appointed to replace Winters in the North Carolina Senate. Except for the period from 1975-78, Wake County has never had a black Senator.

164. Wake County has a seven-member Board of County Commissioners, who must reside in districts, but who are nominated and elected-at-large. Elizabeth B. Cofield, who is black, is a member of the Wake County Board of Coun-

\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

ty Commissioners. Cofield was first elected in 1972 and has been re-elected to successive four year terms since then. She is the only black person to serve on the Wake County Board of County Commissioners.

165. Wake County is a single-county Judicial District with eight District Court Judges of whom currently 2, Stafford Bullock and George Greene, are black. Judge Bullock was appointed by the Governor in 1974 and was elected in 1976 and re-elected in 1980 and has been serving continuously since 1974. Judge Greene was elected in 1974, 1978 and 1982. In addition, Acie Ward was appointed by the Governor to the District Court bench in 1982. She was defeated in her bid for election in 1982. The person who defeated her is white.

166. The Sheriff of Wake County, John J. Baker, Jr., is black. In 1982, Sheriff Baker was elected to his second consecutive term. Baker received 45,775 votes (63.5%) in the general election November 2, 1982, while his Republican opponent Clyde Cook, received 25,646 votes (36.5%). In the Democratic primary held June 29, 1982 Baker received 26,329 votes, Tracy Bowling received 12,218 votes, and Ira C. Fuller received 4,162 votes. Cook, Bowling and Fuller are all white. On November 2, 1982, 77.6% of the registered voters in Wake County were Democrats and 22.4% of the registered voters were Republicans.

167. When John Baker first ran for Sheriff in 1978, he received 15,250 votes in the Democratic primary compared to 15,102 for Lester Kelly and 7,409 for Robert Decatsye both of whom are white. In the second primary Baker got 22,415 votes to 18,925 for Kelly. In the General election Baker got 32,882 votes compared to 31,882 for Cook, the Republican who is white. Baker was the first black sheriff in North Carolina this century.

168. Wake County has a nine-member Board of Education, all of whom are elected from districts. Currently,



one of those nine members, Vernon Malone, is black. Malone was elected from a majority black district.

169. The Wake County Board of Elections consists of three members. J. J. Sansom, Jr. served from March 2, 1970 until December of 1977, when he resigned. Rosa Gill has been a member since December 6, 1977, and has been Chairperson since April 19, 1979. Sansom and Gill are both black.

170. There has never been a black chairman of the Wake County Democratic Party.

171. The City of Raleigh, located in Wake County, has a total population of 150,255 according to 1980 census figures. 27.43% of the population and 18.1% of the registered voters in Raleigh are black.

172. Clarence E. Lightner, who is black, was elected as and served as Mayor of Raleigh from 1973 to 1975. Raleigh is located in Wake County and is the capital of North Carolina. Lightner is the only black Mayor Raleigh has ever had.

173. The Raleigh City Council has 7 members, two elected at large and five elected from wards, plus the mayor serving ex-officio. Since 1979, Arthur Calloway, who is black, has represented a majority black ward on the City Council. Calloway initially defeated William Knight, also black, who served from 1973 until 1979. No other members of the Raleigh City Council are black.

174. House District 8 (Wilson, Edgecombe and Nash Counties) can be divided into four single-member districts with one and only one over 60% black in population.\*

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

175. House District #8 is not changed from the 1971 apportionment. There has never been a black representative from this district.

176. Edgecombe County has a five-member Board of County Commissioners, all of whom are elected at large. Currently, two of those County Commissioners, Thomas Walker and J. O. Thorne, are black. 43% of the registered voters in Edgecombe County are black. Walker and Thorne are the first blacks to serve on the Edgecombe County Board of Commissioners. Wilson County and Nash County have never had a black county commissioner.

177. Wilson County, Edgecombe County, and Nash County have not had a black sheriff in this century. The voting age population of Wilson County is 32.4% black. The voting age population of Nash County is 29.4% black. The voting age population of Edgecombe County is 46.7% black. The Supervisor of Elections of Nash County recalls no black candidate for sheriff over the last 20 years. Over the last twenty years, only one black has filed for and run for the office of sheriff in Wilson County. Frank Jones, who is black, ran in 1974. Out of the field of four candidates, the incumbent, W. Robinson Pridgen, received 3,586 votes in the first primary. Jones, the black candidate received 2,480 votes in the first primary. Two other white candidates received, respectively, 1,662 and 1,270 votes, respectively, in the first primary. Pridgen defeated Jones in the second primary by a vote of 6,321 to 3,414. Over the last ten years only one black is known to have filed for and run for office of sheriff in Edgecombe County.

178. The Wilson, Edgecombe and Nash County Democratic parties have never had a black chairman.

179. It is not possible to draw more than two single-member majority black House districts in Guilford County. One majority black district currently exists.



180. It is not possible to draw more than one single-member majority black Senate district in Guilford County. There is now a single-member Senate district in Guilford County which is 54.9% black in population.

181. On December 31, 1971, Alfreda Webb, who is black, was appointed to replace McNeil Smith, who is white, as a member of the North Carolina House of Representatives from Guilford County. Webb ran for re-election in 1972 and lost in the primary.

182. Henry E. Frye, who was appointed to the North Carolina Supreme Court in 1983 and who is black, was elected to the North Carolina General Assembly as a Representative from Guilford County for the 1969-70, 1971-72, 1973-74, 1975-76, 1977-78 and 1979-80 General Assemblies and was elected as a Senator from Guilford County for the 1981-82 General Assembly. Frye did not run in 1982. Frye is one of seven Supreme Court Justices and is the first black to serve on the North Carolina Supreme Court this century.

183. In the 1982 elections for members of the 1983 General Assembly, William M. Martin, who is black, was elected from the 31st Senate District, consisting of Jefferson Township, Greensboro Precincts 3, 4, 5, 6, 7, 8, 9, 11, 19, 25, 29, and 30, High Point Precincts 3, 5, 6, 7, 11, 12, and 19, Jamestown Precincts 1, 2, and 3, Sumner Township and Block 921 of Census Tract 166 in High Point Township, all in Guilford County. The 31st Senate District is 54.9% black in population. In 1980 William Martin had run for the House of Representatives from Guilford County in a countywide at large election and lost. He was the only black candidate in that election.

184. In the 1982 elections for members of the 1983 General Assembly, Herman C. Gist, who is black, and who is from Guilford County, was elected from the 26th House District consisting of Providence Township of Randolph

County, Greensboro Precincts 5, 6, 7, 8, 19, 29, and 30 and Fentress Township of Guilford County, as a member of the North Carolina House of Representatives for the 1983-84 General Assembly. The 26th House District is 66.9% black in population. Gist had run for city council for Greensboro in an at-large election in 1980 and lost.

185. Guilford County has five Commissioners elected at large for four year staggered terms. Guilford County has not had a black County Commissioner since 1978. At that time B. A. Hall, who had served since 1974, was defeated in his bid for re-election. There has been no black County Commissioner in Guilford County prior to 1974.

186. Guilford County is in a single-county judicial district electing eight District Court Judges of whom currently one, William Hunter, is black. Hunter ran for judge in a countywide single seat election in 1980 and lost. He was appointed by the Governor in 1981.

187. Guilford County has never had a black sheriff.

188. In February, 1982, and in April, 1982, the Senate Redistricting Committee was informed that a Senate district could be drawn in the area of Senate District 2 which was 59.4% black in population.

189. In February, 1982, the Senate Redistricting Committee had before it the proposal of the Black Lawyers Association which contained a proposed single-member district in the general area of current Senate District which was 50.7% black in population.\*

190. In February 1982, Senate District #2 was 51.7% black. In response to the objection letter of the Attorney General of the United States dated April 19, 1982 (Exhibit Y), in April, 1982, the General Assembly amended

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\* Each district would be contiguous, reasonably compact, and have a population deviation of less than plus or minus 5%.

the apportionment of the Senate such that Senate District #2 became a 55.1% black district. It is only possible to draw a Senate district with a 60% or more black majority in the area of Senate District #2 in part by decreasing the 49.3% black percentage in the area of Senate District #6. It is not possible to draw two majority black Senate districts in these areas with both of them over 55% black in population.

191. None of the counties in Senate District #2 had a black sheriff.

192. There are currently four black sheriffs in North Carolina. They serve in Wake, Pender, New Hanover, and Warren Counties. There is currently one black Clerk of Court, in Gates County.

**TRANSCRIPT OF PROCEEDINGS  
(EXCERPTS)**

[19] FURTHER PROCEEDINGS 10:26 A.M.

(Whereupon,

**Bernard N. Grofman**

was called as a witness, duly sworn, and testified as follows:)

**DIRECT EXAMINATION**

. . . . .  
[30] There are several points to be made about the North Carolina House Map. First of all, in the covered jurisdictions—the 40 counties covered under Section 5 of the Voting Rights Act—there are 11 counties which have been divided. They include District 17, which includes part of Cumberland; District 5, Bertie, Gates, Hertford and Northampton; District Number 7, Halifax and Martin and also Warren, which is not a Section 5 covered county; District Number 26, Guilford—and also part of Guilford, Randolph, which is again not a Section 5 covered county. But in any case, a total of 11 counties have been divided. And I repeat that counties which have been divided are indicated by placing in those counties the township boundary demarcation lines as a signal that these counties have been divided in the House reapportionment.

In the non-covered portions of the State, 15 counties have been divided. They are Henderson, Watauga, Avery, Burke, Iredell, Alexander, Catawba, Stokes, Forsyth, Randolph, Chatham, Warren, Pender, Graham and New Hanover. I have deliberately gone over this perhaps too fast. But since this information is available in the stipulation, it seems appropriate to proceed on.

. . . . .



[31] Ms. Winner: At this point I move plaintiff's exhibits 2 and 3 into evidence, as well as \* \* \*

Q. Dr. Grofman, are you familiar with the literature concerning multi-member districts?

A. Yes; I am.

Q. Would you describe to the Court or compare for the Court the features of multi-member districts with the features of single-member districts?

A. There are several—there are five basic features of multi-member districts which I would wish to contrast with features of single-member districts. First, except under the unlikely circumstance that districts are perfectly homogeneous in their population, [32] multi-member districts tend to submerge racial or other minorities. Relatedly, large multi-member districts reduce political competition and incentives to voter turnout because of the winner take all nature feature of multi-member districts. The majority of voters in a multi-member district can and usually does elect all of the representatives to that district.

Voters who see no chance of a candidate of their choice being elected are less likely to vote. Minority voters who may compromise portions of a competitive single-member district or a majority black single-member district are also likely to be submerged by multi-member districts, especially large multi-member districts.

Q. Would you describe for the Court or define for the Court what you mean by "submerged"?

A. Yes. As I define submergence, there are three components to submergence in a multi-member district. First, there must be a sufficient concentration of black voting strength sufficiently concentrated so as to form a majority of a potential single-member district.

Secondly, the present black voting strength must constitute a minority of the voters in the existing multi-member district. Thirdly, voting within the multi-member district must be racially polarized.

[33] Thank you. Are there other comparisons between the features of multi-member districts and single-member districts?

A. Yes. So far I have indicated only the first of such comparisons, the issue of submergence and impact on turnout. The second comparison is one having to do with the base of geographic representation. Multi-member districts almost never give equal representation to all of the geographic areas within the larger multi-member district. And large sets of voters—and in particular, black voters—may have no representative or less than equal opportunity to elect representatives who reside in their neighborhood.

Q. Are there further features of multi-member districts as compared to single-member districts?

A. The third feature is that in a multi-member district the link between a constituent and his or her representative is weakened relative to what it would be in a single-member district.

In a multi-member district, common sensically it is less clear who a voter ought to go to to deal with neighborhood-related problems. There does not exist a one-to-one linkage between voter and representatives.

Multi-member districts are particularly pernicious in their effects when the multi-member [34] representatives—that is, when those elected from the multi-member district—live in only some sections of the multi-member district. And whole large populations, including minority populations, have no representative who lives in their neighborhood or only limited representation from their neighborhood; and thus have no individual representing them who could be expected to be familiar with special



issues that arise on a neighborhood basis or portion of city basis.

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[36] The witness: And I have now completed Item Number 3, which dealt with a link between a constituent and his representative, comparing that link in single-member versus multi-member districts.

The fourth point that I would make is that campaigns in multi-member districts cost considerably more to run than campaigns in single-member districts, which are, of course, going to be smaller in size. Thus, minorities in other less wealthy segments of the society are going to find it difficult to run successful campaigns in large, multi-member districts because of the barriers imposed by additional costs.

The fifth point I would make—which I believe is point Number 6 in the text. There are some minor points which I am skipping over simply for sake of brevity. The fifth point I would make is that multi-member districts fail to satisfy a criterion which political scientists have proposed it important for any election system to satisfy. That is a criterion called consistency.

DIRECT EXAMINATION 10:54 A.M.  
(Resumed)

By Ms. Winner:

[37] Q. What is consistency?

A. Well, it is easier to define inconsistency, if I may. An election system is inconsistent if it is possible for a candidate to win in every precinct or every county, say, in a multi-county, multi-member district—if it is possible to win in every precinct or in every county and still lose the election.

Multi-member districts as they operate in North Carolina are theoretically inconsistent; whereas single-member districts always satisfy the consistency requirement.

Q. Dr. Grofman, have you examined the North Carolina apportionment plan to determine whether or not these theoretical problems exist in North Carolina?

A. Yes; I have.

Q. Calling your attention to the first feature that you pointed out—that of submergence—have you found that submergence occurs in North Carolina?

A. I have indeed found that submergence occurs in North Carolina.

• • • • •  
[48] Would you compare these illustrative single-member districts with the single-member districts which the state has enacted in the Section 5 covered counties?

A. In shape and in nature, these districts are comparable to the district which were created in the covered counties of the state. I might note, however, that the proposed single-member districts in Mecklenburg replacing the Mecklenburg-Cabarrus combined district; in Durham, in Forsyth, in Wake and in Mecklenburg for the House seats—all have the property that they do not require the crossing of county lines. Each single-member district can be composed solely within a given county.

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[50] Q. Would you define for the Court what racially polarized voting is?

A. Quite simply, racial polarization occurs when white voters and black voters vote differently from one another.

Q. Is that in any way different from racial bloc voting?

A. No; it is not. Racial polarization and racial block voting are used in the literature and in the court cases—

at least the court cases with which I am familiar—synonymously.

[51] The elections which I analyzed were all of the elections in the period 1978 to 1982 in these counties involving races in which at least one black was a candidate for either the House or Senate. And those included both primary and general races.

In addition, I analyzed county board primaries in Edgecombe, Wilson and Nash and a county board general election in Edgecombe. And I analyzed the patterns of voting in Edgecombe, Wilson and Nash for the Michaux-Valentine first and second congressional primary as it applied to those three counties.

Q. What were the criteria—

A. (Interposing) I am sorry. That was a 1982 election.

Q. What were the criteria which you used to pick the elections which you analyzed?

A. There were six factors which I took into account before deciding what elections to analyze and before conducting any analysis. First, since we are concerned with polarization in House and Senate elections, it made most sense to me to examine to the extent possible races in the House and in the Senate.

Secondly, since we are concerned with racial polarization it was easiest and most appropriate to look at that in the context of black-white contests, although [52] racial polarization can occur even in elections in which there are no black candidates.

Third, it seemed absolutely essential to have a complete set of elections so as not to be misled by idiosyncratic features of a particular, perhaps unrepresentative, election sample. Fourth, I felt it important to have an adequate representation in terms of the total number of

elections per each county so that we again would not be misled by features of a particular election. And I determined that at least three elections in each county would be sufficient and indeed necessary.

Fifth, I determined it important that there be an adequate representation of different election years, since no single election year can be representative, especially since there will be important differences between—in general, there will be important differences—between elections in which there is a presidential contest or election years in which there is a presidential contest and election years in which there is not a presidential contest; or perhaps between years in which there is a Republican incumbent running for a statewide or national office and years in which there is not a Republican incumbent running for statewide or national office.

Sixth, however, it was important not to go [53] back too far in time lest we obtain elections which did not reflect current patterns of polarization. In balancing the need for an adequate sample of election years and the need for a representative sample of election years, I concluded that three election years—1978, 1980 and 1982, totaling five calendar years—came closest to the ideal.

Finally, if it is impossible to get enough elections of the type we want within a given county or within a given specified range of years, then we should look for additional elections involving black candidates which are as similar as possible to legislative races—for example, ones like county board elections, which also involve a county-wide race. And that was the selection criteria I used in the case of Edgecombe, Wilson and Nash, where there was not an adequate sample of three elections or three contests involving black-white contests from the North Carolina House or the North Carolina Senate in the period 1978 to 1982—or indeed, from any period in recent North Carolina electoral history.



And in those counties, in addition to looking at the one primary which did involve—House primary in the counties—which did involve a black candidate, I also looked at county board elections in each and at a [54] congressional race involving a black-white contest which resulted in two primaries and in a congressional district which encompassed all three of these counties—that is to say, which included as part of the congressional district Edgecombe, Wilson and Nash.

Q. What methods have you used to analyze the data?

A. There are two basic methods which I made use of which are methods standard in the literature for the analysis of racial polarization. The first of these is a method called ecological regression. And the second is a method called extreme case analysis.

Q. What is an extreme case analysis?

A. Extreme case analysis is when in order to understand the voting behavior of white voters and black voters, one looks at precincts which are overwhelmingly composed of members of one race. Thus, if one were interested in the voting behavior of white voters, one would look at voting precincts which had at least 95 percent white population. To understand the voting behavior of black voters, one would look at precincts which had at least, say, 95 percent black population. That is called in the literature extreme case analysis.

Q. What is the purpose of an ecological [55] regression analysis to determine racially polarized voting?

A. The purpose of an ecological regression analysis is to determine if there is racial polarization—that is to say, to determine whether or not white voters and black voters vote differently from one another.

Q. What comparisons are performed in an ecological regression analysis?

A. The basic comparison is a comparison of the proportion of vote received by black or white candidates in each precinct with the proportion of black/white voters in each precinct. That is to say, we look at—for a given black or a given white candidate, we look at the vote received by that candidate or candidates. And we compare that vote in the precinct with the racial proportion in that precinct.

Q. Is there an additional comparison that you make?

A. There are two related comparisons. We may either look at candidates individually and ask for the comparison between the proportion of the vote for a given candidate and the proportion of the district which is of a given race; or we may combine—and this is, again, a standard technique in literature. We may combine all candidates of a given race and examine the [56] votes—the combined votes—for candidates of a given race within each precinct, looking at the comparison of the votes for candidates of a given race versus the racial composition of each of the precincts.

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[57] FURTHER PROCEEDINGS 11:45 A.M.

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Q. Dr. Grofman, if you made a graph of the comparison that you performed in the ecological regression analysis and if race was not a factor in the—if the race of the voter were not a factor in who he or she voted for, what would that graph look like?

A. If we looked at a graph which compared vote proportions received by particular candidates with the racial composition of each of the precincts and race wasn't a factor related to how voters voted, what you would expect to find is that the points on this graph basically would be randomly scattered all over the place; or possibly they



might fall on a flat line like indicating essentially that all voters voted alike regardless of race. But most often, you would expect that they would be randomly scattered.

[58] Q. And if you graph the comparison and the race of the voter is a factor in determining who they vote for, then what does the graph look like?

A. Well, if voting were racially polarized and you looked at such a graph, what you would expect to find is that in comparing the proportion of votes for a given candidate or candidates with, say, the proportion white voters in each precinct, you would expect to see these points that show these proportions fall on something very much like a straight line which will slope either up or down.

Q. And what would it mean if the line sloped up?

A. If the line sloped up, that would mean that as the proportion of whites increased—that is, as the proportion of white voters in each precinct increased—the proportion of votes received by that candidate also increased.

Q. What does it mean if the line slopes down?

A. If the line slopes down, that would mean that as the proportion of whites in the precinct increased the candidate would get fewer votes.

Q. What do you do if the points don't fall exactly on the straight line?

A. Well, points never fall—just in my experience—never fall exactly on a straight line, even when [59] voting was racially polarized. So when the points look like they might be a straight line, you would try to determine whether in fact the points were close enough to forming a straight line to act as if they actually were a straight line.

Q. How do you decide if they are close enough to a straight line for them to be considered a straight line?

A. Well, there are two tests that social scientists and statisticians apply. One is the interocular test. You look at the graph and say, "Is this a straight line?" and if it sort of jumps up and hits you between the eyes, then you decide, "Yes. That is really a straight line." And then if you really want to—

Judge Britt: (Interposing) Do you call that eyeballing it?

The witness: Well, it depends on what state you are in. Social scientists manage to have fancy terms for some unfancy things. And in social science, partly tongue in cheek, it is called the interocular test—i-n-t-e-r-o-c-u-l-a-r.

However, there is also a standard statistic to look at. And that is the statistic which is called correlation or the correlation coefficient, or also [60] called "R" or "Pearson's R" after a gentleman named Pearson, who was the first to propose it.

By Ms. Winner:

Q. What is the range of possible correlation coefficients?

A. The range of possible correlation coefficients is from  $-1$  to  $+1$ ;  $+1$  indicating lines or positive numbers indicating lines which slope up, negative numbers indicating lines which slope down.

Usually political scientists will talk about the absolute value of the correlation coefficient. That is, they will pay no attention to the sign. So if something has, say, an absolute value above .5, that would mean that either it was greater than .5 or it was less than  $-.5$ .

In political science I think it would be fair to say that values of correlations—at least in the kinds of regressions we are dealing with here, one variable versus another

variable—values of correlations above .5 are relatively rare. And certainly most political scientists would treat any value of a correlation above .5 as a situation in which they would act, in effect, as if the points fell on a straight line.

Q. Have you done other ecological regression analyses?  
[61] A. I have done some other ecological regressions and of course, many, many other kinds of regression analyses—thousands of regression analyses over the last decade.

Q. What is the normal range of correlation coefficients you have found in those past analyses?

A. In most of the analyses I have done, one finds correlation—one is happy when one finds correlation coefficients above .3. The only time—the highest correlation coefficient that I can remember occurred when you look at how a person said he was going to vote in an election that was going to take place tomorrow and you compared that with how the person actually voted tomorrow in that case, you got a correlation of around .91.

Q. How do you determine whether or not—

A. (Interposing) There were some people who just didn't know their own minds.

Q. How do you determine whether the correlation coefficient is statistically significant?

A. Again, there is a standard statistical test for the statistical significance of the value of the correlation coefficient. And in the computer programs that I used, that standard measure of statistical significance is reported.

Usually in social science, the rule is that [62] is the statistical significance is less than .01, then certainly we would regard something as statistically significance. .01

would mean that there is less than a 1 in 100 chance that this observed pattern of line likeness could have, in fact, occurred just by chance.

Q. Once you determine the statistical significance of the information, who other factors do you determine in an ecological regression analysis?

A. Well, there are a number of things that can be done with the information from an ecological regression analysis and also from extreme case analysis. You can, for example, determine whether or not voting is racially polarized. You can determine the proportion of the white or the black vote which goes to white or black candidates. You can determine the proportion of white or black voters who vote for particular white or black candidates.

You can determine the ranking of black or white candidates among white or black voters. And you can also determine turnout figures in the election, including the turnout of the white voters and the turnout of the black voters estimated from the regression. And you can also determine the average number of ballots cast in the election by white voters and by black voters. In North Carolina in a multi-member district election, [63] voters may have up to eight ballots or up to eight votes that they could cast. Voters, however, may not choose to make use of the full electoral option. And they may cast less than eight votes.

We can calculate how many ballots on average each voter casts. And we can determine that also separately by the race of the voter.

• • • • •

[77] Judge Phillips: You are being clear. I wonder if it might be appropriate to ask Mr. Leonard if there is any substantial question about the accuracy of these particular exhibits as they reflect or if they reflect the sheer mathematics of the situation? We seem to be spending an awful



lot of time to develop a point that, while not within the range, I suppose, of judicial notice, is almost there.

Mr. Leonard: If the court please, we don't disagree with Dr. Grofman's arithmetic, just his conclusions. The methodology that he has used is a methodology that Dr. Hoffer will, in fact, rely on and [78] will be using some of Dr. Grofman's exhibits to rebut the conclusions that he comes to.

. . . . .  
[79] Dr. Grofman, from the results of your analyses of these 55—

A. (Interposing) 53.

Q. 53—excuse me—elections, did you reach any general conclusions?

A. Yes. I reached a number of general conclusions.

Q. What are those conclusions?

A. The first general conclusion that I reached about polarization in all of the eight counties in question is that in each and every one of the 53 elections which I analyzed, these elections were racially polarized. Indeed, there was racial polarization even in elections with black incumbents and even in elections [80] with blacks running in which there was no contest.

The correlations ranged from .7 to .98 with most well above .9. Again, I can give an illustration from Durham. But I won't bother. The court can see quite clearly that in Durham all but one of the correlations are quite high. And even that one is at the .7 level, which is still well above the range which would be considered significant. And moreover, the statistical significance test of all the regression analyses found a statistical significance level of .0001—that is to say, a likelihood that the results could have occurred by chance alone of less than 1 in 100,000.

The second general conclusion—actually, I am going to give it in three parts. First, in North Carolina general elections no black candidate ever got a majority of whites to vote for him or her. And this was true even for black incumbents and even for candidates running in races which were uncontested. Even such individuals—such black candidates—did not receive the votes of a majority of white voters.

Indeed, on average over these elections more than 60 percent of the white voters did not vote for the black candidate.

The second part of my second conclusion deals with primaries. On average in the eight counties in the [81] primaries, less than 20 percent of white voters voted for the black candidate. Except in unusual cases—3 out of 25—in all the primary elections, 60 percent or more of whites did not vote for the black candidate. I might note the three exceptions.

In the three exceptions the votes for the black candidate given by white voters ranged between 47 percent and 50 percent in the primary. But then in the general election the candidate went on to get less than a majority of the votes of white voters in all three of these cases.

The third part of my general conclusion 2 is that in general elections black candidates almost always rank last or next to last among white voters except in general elections in heavily Democratic areas where black candidates sometimes rank last overall, but almost always rank last or next to last among Democrats.

And similarly, in primaries—again, with a handful of exceptions—white voters give fewest votes to black candidates of any candidates in the race.

Turning now to my third conclusion—third general conclusion—looking at primaries and general elections as a



two-stage process which candidates must overcome if they are to be elected, since it does no good to be potentially capable of winning a general [82] election if one has lost the primary or to be potentially of winning a primary if one is certain not to lose the general election, I would conclude that in North Carolina in the eight counties I have studied black candidates cannot get a majority of whites to vote for them, no matter what these black candidates do and no matter who these black candidates are. In short, racial polarization is severe and persistent.

My fourth general conclusion is that although black incumbency—that is, the presence of a black incumbent in a race—moderates the amount of racial polarization, it does not eliminate it, since as I indicated earlier, all of the races I analyzed did involve racial polarization including those with black incumbents.

Moreover, if we look not at black elected incumbents but at black appointed incumbents, we find that being a black appointed incumbent is no great help to electoral success. There were three black appointed incumbents in these races, 1978 to 1982. All three lost, either in the primary or the general election.

Actually, just as a footnote, there were potentially—one might count there being four appointed incumbents. A black candidate, Motley, was appointed to replace Alexander, who died. Alexander held the position [83] of Senator from Mecklenburg and Cabarrus. However, the election took place before Motley's name or anyone else's name that appear on the ballot. And in that race, Alexander—who was not alive—lost. But nonetheless, in that race, Alexander received the clear, overwhelming support of the black community. And Alexander received less than one third of the votes in the white community.

I might note in general, that the appointed black incumbents got less than one third of the white voters to vote for them in each of these three cases.

My fifth general conclusion is as follows: even though a constituency has elected a black candidate in the past, this does not provide a guarantee that it will do so in the future, especially if the black incumbent who is the present occupant of that position does not run in the future in subsequent races.

My sixth conclusion: in general elections, wherever there is a black Democrat running and wherever a Democrat loses, it will be the black Democrat who loses. For all practical purposes, Republicans never vote for black Democrats. But, Republicans do sometimes vote for white Democrats.

Judge Dupree: How do you find out who anybody votes for?

[84] The witness: The techniques in question here are to look at, again, ecological regressions, looking at now the proportion Republican in each district rather than the proportion black in a district and comparing the vote patterns as districts change in their proportion Republican.

What we find when we do that is that as the Republican proportion increases, the likelihood of a vote for the black candidate decreases; and indeed, decreases so dramatically that one can have confidence in the conclusion that for all practical purposes, Republicans simply do not vote for black Democrats. But they do vote for white Democrats.

There is another form of analysis I have performed if you wish me to go into it, which also supports that conclusion. That is to be found in Appendix 5 to Exhibit 11.

By Ms. Winner:

Q. Dr. Grofman, in explaining that you used the word "districts."

A. I am sorry—precincts, I think. Whenever I am talking, I will distinguish—precincts are the areas in voters register. Districts are the constituencies from which candidates run.

Q. Do you have any further general conclusions?

[85] A. Yes. I have two further general conclusions. My seventh general conclusion is with respect to single shot voting. For a non-incumbent black to win an election in which it was realistically possible to elect an all-white slate—that is to say, it might not be realistically possible to elect an all-white slate if, in fact, there are no candidates running in opposition to the nominees, as in Durham, for example, in 1980.

If you have a non-incumbent black trying to win an election in which it was realistically possible to elect an all-white slate, the black community has to vote almost exclusively for the black candidate in order to provide any reasonable chance for that black candidate to be elected, given the degree of racial polarization in these counties.

And my eighth and final general conclusion about all of the counties as a whole is that even though blacks must often concentrate—black voters must often concentrate their votes on black candidates in order to give these black candidates a chance at winning, on balance whites—that is to say, white voters—are less willing to vote for black candidates than black voters are willing to vote for white candidates.

And again, I can provide, if the court wishes, exact calculations to support that conclusion.

[86] Do these general conclusions also apply to the individual counties?

A. Yes. These general conclusions apply to each of the counties singly as well.

Q. Have you conducted your analysis county by county?

A. Yes; I have.

• • • • •

Q. What are your conclusion about Forsyth County?

A. In Forsyth, blacks will lose unless Republicans—black candidates will lose in the general election unless Republicans do poorly, since if there is a [87] Republican winner in the general election, that Republican winner will knock off the black Democrats, since as I previously indicated, Republicans do not vote for black Democrats although they do vote for some white Democrats.

Moreover, in Forsyth County examining the pattern of racial polarization over the three election years, there is no consistent trend to suggest that racial polarization is declining over time in this county.

Q. Have you examined in particular the results of the 1982 House election in Forsyth county?

A. Yes; I have.

Q. In that election, how many black candidates won?

A. In that election, two black candidates won.

Q. In your opinion, what is the likelihood of that result repeating itself?

A. I think the likelihood of that result repeating itself is very close to zero.

Q. What is the basis of that opinion?

A. The basis for that opinion is severalfold. First of all, the racial polarization in Forsyth in 1982 was exactly identical to what it was in 1980 in the primary. What was different between 1980 and 1982 was [88] that in 1980 there



were five white candidates running for five seats. In 1982, there were nine white candidates running for five seats in the primary.

In both cases, 1980 and 1982, there were two black candidates running in the primary. In 1982 there were more white candidates than white voters could vote for. And moreover, there were not white incumbents in the race, because four out of five white incumbents had declined to run for re-election.

So the white vote was split nine ways in the primary, while the black vote was concentrated among two black candidates. Absent a situation in which whites will once again so split their vote, there is no reason to anticipate that two black candidates would emerge from a primary in Forsyth, even though two of those blacks are now incumbents.

The reason for that, as indicated, is that the degree of racial polarization in Forsyth, particularly in the primary, does not lead one to believe that white voters will vote for black candidates.

[90] Another difference between 1980 and 1982 which cannot be expected to reoccur in 1984 is that in Forsyth from 1980 to 1982 black turnout in the primary stayed constant. But white turnout in the primary decreased. I note, as I have previously noted, that 1980 was a general presidential election year. One might also take note of the fact that 1984 is a general presidential year. It also is a year in which there in the state of North Carolina is an incumbent Republican candidate for the United States Senate who is likely to be running.

Insofar as portions of this decline in voter turnout can be attributed to a decline in Republican voters, certainly one would expect those Republican voters who are white and who do not vote for black candidates would be more likely to turn out in 1984; and secondly, that in general

the discrepancies between white voter turnout and black voter turnout which manifests itself in 1980 election would again emerge in 1984.

In 1980 there was a considerable discrepancy in the general election between the turnout figures for whites and for blacks. In 1982, black turnout declined slightly, but only slightly from what it had been in 1980. White turnout in the general election in Forsyth in 1982 declined substantially—20 percentage [91] points—from what it had been in 1982.

Clearly, 1982 is not a representative year, nor are the circumstances—multiplicity of white candidates, low white turnout, off presidential year—which occurred in 1982 likely to repeat themselves in the future. And certainly at worst one can say there is no guarantee that they would repeat themselves in the future.

[94] Q. Dr. Grofman, did you reach any conclusions as a result of your analysis about Mecklenburg County?

A. Yes. I reached some conclusions about Mecklenburg County specifically in addition to the general conclusions applicable to all of the districts that I looked at.

Q. What were the specific conclusions that you reached about Mecklenburg County?

A. My clear conclusions about Mecklenburg were very similar to my conclusions about Forsyth. In Mecklenburg, blacks will lose unless Republicans do poorly since, as I noted before, if there is a Republican winner he or she will be most likely to knock off the black Democrat rather than a white Democrat because of the racial polarization that exists in the election.

This also implies that one can expect a difference in election outcomes in years in which there are special incentives for Republican turnout than in other years—in



particular, years in which there is a Republican incumbent or a popular Republican candidate running either for a national or a statewide ticket.

Judge Phillips: Do you think you could summarize the conclusions that you have reached in general with respect to all of these and simply devote your—

[95] The witness: (Interposing) No. With respect, your honor, I could not. The conclusions do, in fact, differ from county to county.

Judge Phillips: Very well.

By Ms. Winner:

Q. Do you have any other conclusions about Mecklenburg County?

A. Yes. In Mecklenburg—and this is, indeed, a general conclusion which applies to all of the counties. I indicated this conclusion previously for Forsyth. In Mecklenburg and Forsyth and in the other districts which I looked at, there are no consistent trends over the course of the three elections which would suggest that racial polarization is declining over time in these counties or in these districts.

Q. Do you have further conclusions specifically about Mecklenburg County?

A. No; I do not.

Q. Did you examine the 1982 House race in Mecklenburg County?

A. Yes; I did.

Q. Were you present in Dr. Hoffer's deposition where he gave an explanation for why candidate Richardson lost?

A. Yes; I was.

[96] Q. Do you recall what that explanation was?

A. Dr. Hoffer indicated as a factor in the defeat of Mr. Richardson the fact that he received inadequate support from the black community.

Q. Do you agree with that analysis?

A. No; I do not.

Q. Why not?

A. If one looks at the data which is to be found in Appendix 3, Table 1, you will see that Mr. Richardson received the votes of 88 percent of the black voters and the votes of only 29 percent of the white voters—this in a county which is over—and lost to a Republican in a county which is overwhelmingly Democrat.

Given that 88 percent of the black voters voted for him and 21 percent of the white majority population of the district voted for him, it seems to me rather absurd to blame his lack of success on a failure of adequate support from the black community.

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[98] Q. Do you have any particular conclusions about Durham County?

A. Yes. I have some general conclusions about Durham County. In Durham I would conclude that winning the Democratic nomination is tantamount to election. And thus this means that given the incumbency advantage, [99] it is likely that present black incumbents would have a reasonable probability, while certainly not a certainty, of re-election.

However, if these incumbents do not run, the observed levels of racial polarization in the primary make very problematic the selection of a black candidate to supersede a retiring black incumbent.

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[100] The witness: To repeat, if I may, briefly and clearly, the candidates in 1978, Mr. Spaulding and Mr. Clements—one received 10 percent or ten percent of white voters voted for one of these candidates. 16 percent of white voters for the other. 89 percent of black voters voted for one of these candidates. 92 percent of black voters voted for the other. The data in question are to be found on the first page of Appendix 3 to Exhibit 11, Table I.

Okay. Turning to the 1982 election, since one would not wish to be accused of not looking at 1982, 37 percent of the white voters voted for the incumbent black candidate. And that is to say, 73 percent of the white voters didn't—I am sorry—63 percent of the white voters did not vote for the incumbent black candidate in the primary. And on the other hand, 90 percent of the black voters did vote for the incumbent black candidate, [101] Mr. Spaulding.

By Ms. Winner:

Q. Dr. Grofman, how many candidates were there in the Durham County primary in 1982?

A. There were four candidates in the Durham primary in 1982, two of them black and two of them white.

Q. How many seats were there?

A. There were three seats to be filled.

Q. Does that influence your analysis of that county—that election?

A. That makes it even more patently obvious to the extent of racial polarization, insofar as the primary election is one in which it is mathematically certain that a black candidate must be elected. That is to say, there are two whites, two blacks, three individuals being selected. One of the individuals selected—at least one of the individuals selected—must be a black. At least one of the individuals selected must be a white.

What this implies is that white voters in such a primary might be inclined—knowing that a black candidate is guaranteed of election in that primary—might be inclined to cast votes for a particular black candidate as opposed to another black candidate in order [102] to have the black candidate whom they would regard as the lesser of two evils elected. Thus, there would be an additional incentive for white voters, even those who might not normally vote for a black candidate, to vote for a black candidate in an election where it was a certainty that one black candidate would win and the question was which one it was going to be.

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[147] FURTHER PROCEEDINGS 3:36 P.M.

CROSS-EXAMINATION 3:56 P.M.

By Mr. Leonard:

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[159] Q. If I understand that definition as you have used it—please correct me if I am wrong. If the white population in a particular election district does not vote for or [160] support black candidates in the same percentage that the black population of that election district supports the black candidates, then it is your opinion that there is racial bloc voting or racial polarization in that election; is that correct?

A. That is correct.

Q. Now, with respect to that definition, do you quantify at all—do you find that there is in some elections some racial bloc voting in other elections a significant amount of racial bloc voting or do you quantify it in some other way?

A. There are two ways to distinguish among levels of racial bloc voting for the absence or presence of racial bloc voting. The first question is is there racial bloc voting? The answer to that is based on the relationship between the race of voters and their votes. If there is a consistent relationship between race of the voter and the way in which the voter votes, then there is indeed racial polarization.

Having established that initial fact, one may then ask is the observed racial polarization at a level which is statistically significant? In answering that question, one may look at the correlation coefficients. One may look at in particular the level of statistical significance of the correlation coefficient.

[161] I have previously testified that I have done so for each and every one of the 53 elections I have examined and have found each and every one of them to be statistically significant.

Q. When you say "statistically significant"—

A. (Interposing) I am sorry. I have not finished my answer.

Q. Go ahead.

A. One may also wish to consider "whether or not there is substantively major important substantively significant racial polarization." There is no consensus as to what such a term would mean, though as I have testified, in my view a situation in which a majority of the white voters are unwilling to vote for any black candidate would certainly constitute such substantively significant racial polarization.

• • • • •

[175] Q. And specifically candidate two was Charlie Grady Houser, now Representative Houser?

A. Yes.

Q. And candidate three was Annie Kennedy?

A. Yes.

Q. And they were the two black candidates?

A. Yes.

Q. And they were successful in the election; is that correct?

A. Yes.

Q. Now, did you specifically take this election into consideration when you formed your conclusion with respect to the 53 elections that you looked at, that in Forsyth County and in North Carolina generally, there is substantially significant racially polarized voting?

A. Yes; this is one of the 53 elections I analyzed.

Q. And so the record is clear, in that election C. G. Houser received—and I am only going to use the regression estimates and not the extreme case estimates—received .87 percent—I'm sorry—received 87 percent of the black vote and 42 percent of the white vote?

[176] A. That is correct.

Q. And Representative Kennedy received 94 percent of the black vote and 46 percent of the white vote?

A. That is correct.

Q. And is it correct, Dr. Grofman, to state that your conclusion with respect to substantially significant racial polarization in voting with respect to Forsyth County assumes race to be the predominant factor in that election?

A. No; that is not correct.

Q. What other factors did you consider?



A. Did I consider in asking the question whether there is racial polarization?

Q. Correct.

A. The only question which I considered in answering—the only data I considered in answering the question of racial polarization is the voting behavior of whites and blacks.

Q. Listen carefully to my question again. With respect to your conclusion that there is substantially significant racial polarization in voting in Forsyth County, did you assume that race was the predominant factor in the election?

A. No, I did not. I can only repeat the answer I gave previously.

[177] Q. Do you know what I mean by "factor"?

A. Yes.

Q. Is race a factor in an election?

A. Yes.

Q. What other factors did you consider with respect to Forsyth County to come to your conclusion which is that there is racial polarization—I'm sorry—that there is substantially significant racial polarization in voting in Forsyth County?

A. None; that is to say racial polarization as I have defined it deals with the voting patterns of the white voters versus the voting patterns of black voters. Therefore, I look at the voting patterns of white voters versus the voting patterns of black voters to determine racial polarization.

Q. Then you considered only the factor of voting in your conclusion?

A. Yes; since the definition of racial polarization I have given is the definition having to do with voting.

Q. Let me strike that question and re-ask it. You therefore considered only the voting patterns that you found in the statistical data that you looked at in order to reach your conclusion?

A. Yes, that is correct with the exception of [178] the fact that I did have knowledge of which candidates—which black candidates were incumbents.

Q. And you knew which ones were black and white?

A. That is correct.

Q. I believe you testified that—I don't want to change the words and I don't remember them specifically so please correct me if I am wrong—that you could practically guarantee that the election results in Forsyth County in 1984 with respect to the two blacks would not be repeated as they were in '82; is that correct?

A. That is my belief; yes.

Q. Can you tell the court any instance in which a black incumbent in the General Assembly has lost an election when that incumbent sought re-election?

A. There are no such examples in which—in counties in which—there are no such examples.

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[181] Q. Now, if you would for me, let's move on to the Durham House primary in June of 1982 which is Gingles Exhibit 16(D).

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Q. First of all, Dr. Grofman, what do you conclude from this exhibit with respect to the ability of the black community to single-shot vote?

A. The black community in this exhibit did give the bulk of its vote to candidate number four.

Q. Well, the bulk by approximately three to one; [182] isn't that right?

A. That's right.

Q. Would you agree, Dr. Grofman, that single-shot voting by the black community in Durham County at least from the results of this election shows a high degree of political sophistication?

A. It either shows a high degree of political sophistication or a high degree of racial polarization.

Q. With respect to the conclusion that you drew, looking at the fact that Clement received 32 percent of the black vote and 27 percent of the white vote, Spaulding received 90 percent of the black vote and 42 percent of the white vote, does this election form part of your conclusion that there is substantially significant racially polarized voting in Durham County?

A. Yes. In this election, I have not concluded that there is substantially significant racially polarized voting.

Q. I'm sorry. I didn't hear that.

A. In this election—the question you specifically asked was: Is this one of the elections that I took into account in deciding whether or not, in the county as a whole, there was substantially significant polarization. The answer to that question is, "Yes."

Unless I be misinterpreted, let me be clear [183] that I am not concluding that in this election there was substantially significant racial polarization. There was statistically significant racial polarization. There was racial polarization.

Mr. Leonard: May I have just a moment?

(Pause.)

By Mr. Leonard:

Q. Now, Dr. Grofman, in that election—the one we were referring to—Representative Spaulding who is a black was a winner and Mr. Clements who is black was a loser; is that right?

A. Yes.

Q. Now go with me if you would to Girgles exhibit 16(c) which is—I'm sorry—(E) which is the very next exhibit which is the summary sheet on Durham County in the House general election of November of 1982 to elect three candidates—I'm sorry—to elect three representatives and there were three Democrats running and one Independent white; is that right?

A. Yes; that's correct.

Q. And Representative Spaulding was the black—one of the three black Democrats in that election; correct?

A. Correct.

Q. Looking again at the column which would be the [184] third column, "Regression estimate," Representative Spaulding received 89 percent of the black vote in that election and the next closest candidate who was white received 13 percent and the other two white candidates received less than that; correct?

A. Yes; that is correct.

Q. Is that an example of single-shot voting by blacks?

A. Yes.

Q. And does that election indicate to you that there is a high degree of political sophistication by the blacks?

A. There again, either a high degree of political sophistication or high racial polarization.

Q. All right. Please note over in the regression estimate column that Spaulding received 43 percent of the white vote.

A. That is correct.

Q. Do you conclude—do you consider this election as part of the overall information when you came to your conclusion that there is substantially significant racial polarization in voting in Durham County?

A. Yes.

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[186] Q. Looking at the column, "Regression Estimates," would you draw any conclusion from the fact that Senator Alexander received 87 percent of the vote and the next [197] highest vote among the blacks received by white candidates was 27 percent, the other three being lower, with respect to the political sophistication of blacks in Mecklenburg County to single-shot vote?

A. Again, blacks were concentrating their ballots on the black candidates.

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[189] Q. Do you draw a conclusion, Dr. Grofman, from those statistics with respect to the sophistication of black voters to use single-shot voting?

A. Yes; black voters are using single-shot or concentrated voting—casting fewer ballots than they are entitled to cast and concentrating those ballots on black candidates.

[193] Q. Go with me, please, to Gingles Exhibit 17(D) which is the House primary in Wake County in June of 1982.

[194] Mr. Leonard: June 1982, the House primary in Wake County.

by Mr. Leonard:

Q. There were 15 candidates to—15 Democratic candidates to fill six nominee positions; is that correct?

A. Yes; that is correct.

Q. Only one of those was a black?

A. Yes; that is correct.

Q. That is Representative Dan Blue who is listed as candidate number two on this exhibit?

A. Yes.

Q. Who was the highest vote-getter in that election?

A. Candidate two, Mr. Blue.

Q. And he received 82 percent of the black vote and 39 percent of the white vote?

A. That is correct.

Q. And from this election do you conclude that there is substantially significant racial polarization in voting in Wake County?

A. In Wake County, or in that particular election?

Q. In that election.

A. In that election; no, I do not.

[195] Q. Tell me, what is it statistically that causes you to believe that this does not meet your definition of substantially significant racial polarization in voting?

A. Substantially significant racial polarization in voting as I have defined it occurs when the differences in the voting pattern of black voters and white voters are such that the racial composition of the electorate will affect the election outcome, that is to say, such that if the election were held entirely within the members of one community as opposed to entirely within the members of the other



community, the set of candidates who would be elected would be different.

Q. And this is not such an example?

A. That is correct.

[203] REDIRECT EXAMINATION 10:27 A.M.

By Ms. Winner:

Q. Dr. Grofman, Mr. Leonard has just taken you through some eight individual election contests. How do these eight contests compare to the other 45 contests which you have analyzed in terms of the degree of racial polarization?

A. They are among the election contests with the least racial polarization and, indeed, they include the only election contests in which I have concluded that there is not substantially significant racial polarization.

Q. Drawing your attention to plaintiff's exhibit number 15(f) and I am going to briefly go over these in [204] the same order that Mr. Leonard did.

Q. Could you point out how white voters ranked the two black candidates, Kennedy and Houser, in that election?

A. Yes; white voters of the eight candidates in that race for general election in Forsyth County in November 1982, white voters ranked the two black candidates seven and eight—last and next to last—for five seats to be filled.

Q. And how did black voters rank those two candidates in that election?

A. First and second.

Q. Moving on to plaintiff's exhibit number 16(d) which is the Durham County June 1982 primary?

A. Yes.

[205] Q. Was it possible in that election for a black candidate not to be elected?

A. No; it was not.

Q. Why was that?

A. There were four candidates in the race. Two of them were black. Two of them were white. There were three seats to be filled, therefore it is mathematically impossible to have elected fewer than one black candidate since there were only two white candidates in the race and three seats to be filled.

Q. What is the percentage of white voters who did not vote for the black incumbent?

A. Percentage of white voters who did not vote for the black incumbent is 63 percent.

Q. And what is the percentage of white voters who did not vote for each of the white incumbents?

A. 32 percent and 33 percent.

[214] Q. Now, I believe that yesterday afternoon you testified concerning plaintiff's exhibit number 19 on cross-examination?

A. Yes; that is correct.

Q. And my recollection is that you testified or that you agreed with Mr. Leonard that Republicans are unable to defeat 67 percent of the black Democrats who made it to general election; is that right?

A. That is correct.

Q. What is the percentage of white Democrats that Republicans are unable to defeat?

A. 88.2.

[215] Q. And do you consider that to be a significant difference?

A. Given the sample size, that is the large number of cases looked at, yes.

• • • • •

[216] Q. Now, on cross-examination you calculated the average size of a North Carolina house district?

A. Yes; I did.

[217] Q. And that average included all the districts in the state?

A. That is correct.

Q. Does the fact that average size in North Carolina is not higher than some or all of those largest averages in the country change your opinion about whether Mecklenburg County is an unusually large house district?

A. No, it does not.

Q. Does it change your opinion about whether Forsyth County is an unusually large house district?

A. No, it does not.

Q. Does it change your opinion about whether Wake County is an unusually large house district?

A. No, it does not.

Q. Does it change your opinion about whether the Wilson-Edgecombe-Nash district is an unusually large house district?

A. No, it does not.

Q. What is that opinion?

A. That opinion is that all these districts are large house districts relative to either the average size of the states with the largest average size house districts or, even more

particularly, with respect to North Carolina since North Carolina four, five, six and eight are higher than 2.91, the figure calculated for [218] North Carolina.

Q. And drawing your attention to the senate, does the fact that North Carolina's average senate district—

Judge Phillips: (Interposing) Why don't you shortcut that and ask him the same question. This is just nails in the coffin. All of this is in the record and you are simply trying to emphasize that his conclusion is unchanged.

By Ms. Winner:

Q. Is your conclusion unchanged about the Mecklenburg-Cabarrus senate district?

A. It is not; it is both unchanged and reinforced since a within North Carolina comparison strengthens the point made yesterday.

• • • • •

[219]

#### EXAMINATION

By Judge Dupree:

Q. I would like to ask Dr. Grofman if the study of the kind you have made and on which you have based the conclusions given us assumes that all candidates, regardless of race, are equally qualified in all of these elections?

A. It makes no assumptions whatsoever about relative qualifications of candidates since those, I believe, that judgment should be made by voters.

Q. How can you be sure that the election results do not reflect judgment of the voters as to the relative qualifications of the candidates and not necessarily their racial preferences?

A. I cannot read the minds of the voters, but when black voters consistently rank black candidates one or two in

their preference ordering and white voters consistently rank black candidates at the bottom of their preference ordering in a society which has a history of racial discrimination and in which there is clear racial polarization, it seems to me a plausible, indeed, the most plausible explanation is that race is what is determining the elections.

• • • • •

[224] (Whereupon

Harry Watson

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 11:01 A.M.

By Ms. Winner:

• • • • •

[276] Q. Who won that election?

A. Jesse Helms.

Q. What do you conclude about racial involvement in politics during this time period according to that election?

A. That racial appeals were still a very important [277] part of the political climate of the state; that they could be used and were used by leading white candidates and that the political power of blacks was still so weak that they could not defeat candidates who took these kinds of positions.

• • • • •

[278] Q. Have you also examined the congressional race for the second congressional district that happened in 1972?

A. Yes.

Q. Who were the candidates in that race?

A. In the Democratic primary the candidates were Richard L. Fountain and Howard Lee.

Q. And have you examined the election occurring in that race by county?

A. Yes.

Q. Where did you obtain those returns?

A. I obtained them from the *Durham Morning Herald* coverage of the election after it was over.

Q. Is that a source on which historians normally rely?

A. Yes.

Q. What did you conclude from that analysis of that election? Before that, what race is Mr. Lee?

A. He is black.

Q. And what race is Mr. Fountain?

A. He is white.

Q. And now what did you conclude from your analysis [279] of that election?

A. I compared the percent voting for Lee with the percent of non-white registered voters in each of the counties. There are 12 counties in the District. With the exception of Mr. Lee's home county of Orange County, the proportion voting for Lee did not differ from the proportion of non-white registered voters by more than nine percent and usually it was much, much closer than that—three percent, four percent.

Q. What were the counties in that district at that time?

A. Caswell, Edgecombe, Franklin, Granville, Halifax, Nash, Northampton, Orange, Person, Vance, Warren and Wilson.



Q. In particular, what were the results that you found in Wilson, Edgecombe and Nash counties?

A. In Edgecombe, the percent for Lee was 41.2; the percent of non-white registered voters was 35.6.

In Nash, the percent for Lee was 33.9; the percent of non-white registered voters was 25.7.

In Wilson, the percent for Lee was 32.4 and the percent of non-white registered voters was 24.7.

Q. And what about in Halifax and Northampton counties?

A. Sorry. In Halifax, the percent for Lee was [280]

[281] Q. What were the results of your study with regard to voter registration?

A. Well, the percent of black voters registered in 1960 was 39.1 percent. The percent of white voters was 92.1 percent. For whites, that was the highest [282] proportion in the south. For blacks, it was not the highest proportion in the south.

[284] By Ms. Winner:

Q. Do you have before you exhibit number 41?

A. Yes.

(C. Antiff exhibit 41 was marked for identification.)

Q. What is that?

A. This is a graph of the number of black officials elected in North Carolina between 1970 and 1981.

Q. What do you conclude from that graph?

A. Well, the number of black elected officials in 1970 was very, very small. The figures here show that it was 62, I believe.

Over the next three years, it more than doubled [285] and then by 1975 it had quadrupled to something over 200 so that between 1970 and 1975, the number of black elected officials in North Carolina increased dramatically.

Thereafter, growth almost stopped except for a jump between 1977 and 1978. The curve is almost flat thereafter.

Q. And what does that tell you about the extent of election of blacks in North Carolina?

A. It is still very, very low.

[307] Q. Professor Watson, what is your overall conclusion about the role of race in North Carolina politics during the first 75 years of the century?

A. It has been extremely important throughout that period. Whites continued to be very fearful of the exercise of political power by blacks and politicians [308] found that they could appeal to those white fears and win elections on the basis of those appeals. They found indeed that such appeals were essential to their success.

Blacks found that they did not have sufficient political power to counter those appeals or to punish, in effect, the officeholders or politicians who made them.

Q. What is your overall conclusion about participation of black people in the political process in this century?

A. Since disfranchisement, it has been very, very low and it has increased only as a result of the legislative and political court battles, struggles in Congress and in the neighborhoods.

[325] (Whereupon

Paul Luebke

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 3:01 P.M.

By Ms. Guinier:

• • • • •

[344] "... Helping to forge city policies of divergent and sometimes controversial views and ensure public support for them."

(Pause.)

They go on to say that Mr. Knox is best equipped for that.

It is my professional judgment that the *Charlotte Observer* concluded that a black person could not bring together black and white communities, that you must be white to bring together black and white communities, an extraordinary conclusion in that they have acknowledged that the black candidate was, in fact, more qualified on the merits.

Judge Phillips: Are you testifying that you think that that expression of editorial opinion communicates an idea to voters that has racial significance?

The Witness: Yes, sir.

Judge Phillips: That is your testimony?

The Witness: Yes, sir.

By Ms. Guinier:

Q. I direct your attention now to plaintiff's exhibit 47 and ask you to describe that.

A. This is an ad by the Knox campaign. The line to which I draw the court's attention is at the bottom of the text,

[345] "... We urge you to vote for a mayor who is concerned for the total city, not just a few selected areas."

These are sophisticated telegrams, I acknowledge, but they are codes that say, "Harvey Gantt, a black person, could only represent a few selected black areas whereas Eddy Knox, a white man, can represent the total city."

Q. I ask you to describe plaintiff's exhibit 48.

A. 48 is another Knox campaign ad which has brought together a number of statements including the *Charlotte Observer* editorial which I alluded to a few minutes ago. What we see in this advertisement is that in example after example, the emphasis is upon all sections of the city, for example, the *Charlotte Weekly Sunday*, the third reference that Eddy Knox has a reputation in all sections of the city.

Quoting from former mayors of Charlotte, the ad goes on,

"... Eddy Knox will serve all the people of Charlotte."

Editorial, "Knox can unify this city."

*Charlotte Weekly Sunday*—I'm sorry. I've got two pages and I've repeated.

Former city council members and city council commissioners write,

[346] "... He has a compassion for all our citizens,"

Again, a sophisticated telegraph message, but the idea that to support all citizens, one must be a white.

Judge Dupree: Doesn't every candidate for public office at any level in the governmental structure always make that claim?

The Witness: Sir, I think not. I think that the emphasis on selected areas juxtaposed to all the city is a particular phenomenon of racial politics.

• • • • •

[350] Q. I direct your attention to plaintiff's exhibit 50. Do you have a copy of that in front of you?

A. Yes.

(Plaintiff exhibit 50 was marked for identification.)

Q. Can you identify that document, please?

A. Yes; this is a document from the *Durham Morning Herald* published in the month before the May, 1980 Democratic primary in which the newspaper reporter summarizes efforts to elect an all-white Durham County board of commissioners as well as an all-white Durham County board of education.

The article takes note of the fact that the all-white electoral attempt was in the wake of a successful all-white election slate elected for city council elections in November of 1979. This is noted in the third column of the article.

[351] In that election, the "code," the telegraphed issue was progress and the issue was a low-income black community which was fighting the extension of a highway. This article links then both the November 1979 successful attempt to elect an all-white slate as well as a proposed all-white slate for May, 1980.

• • • • •

[352] Ms. Guinier: That is correct, your honor.

By Ms. Guinier:

Q. May I direct your attention to plaintiff's exhibit 51 and ask if you can identify that?

(Plaintiff's exhibit 51 was marked for identification.)

A. It is an advertisement which appeared in the *Durham Morning Herald* on May 4, 1980, on the eve of the May 1980 primary election.

Q. Is this one of the research materials that you have used in forming your conclusion?

A. Yes; it is a campaign advertisement.

Q. And could you describe this particular document for us?

A. This is a document which shows a picture of five white members of the all-white slate alluded to previously and urges people to vote for these five candidates.

Q. And what conclusions do you draw from this particular document?

A. This is not particularly sophisticated. It is merely saying—it is showing the pictures of five white men and saying, if you wish to vote white here is your slate.

[353] Q. Did you also analyze any—

Judge Britt: Just a moment. I want to ask a question. Do I take it that you feel that the only way that racial telegraphing could be avoided would be to eliminate photographs from political ads?

The Witness: Sir, I examine these elections in a political context. I do not mean to suggest that every time a picture of a white candidate appears that that is racial appeal and therefore I do not suggest as a remedy that pictures must be banned from political campaigns. But in the context of Durham County politics for May 1980, my analysis is that the use or purpose of placing five white men's picture in the paper was to make a racial appeal to white voters.

Judge Britt: You may proceed.

Ms. Guinier: Thank you, your honor.

By Ms. Guinier:



Q. Did your analysis of plaintiff's exhibit 51 also include an analysis of the language that was used in that particular advertisement?

A. Yes; at the bottom of the ad is a reference to "continued progress in Durham County." This refers to, for those who are familiar with the context of Durham County politics, the use of progress as the code word in the November 1970 city council elections which I referred [354] to previously. So the words, "continued progress—"

Q. (Interposing) What was the date of that election?

A. November 1979.

Q. I'm sorry. Would you repeat that?

A. November of 1979, and May 1980. "Continued progress," my interpretation of that is to remind voters of the issues in 1979—fall of 1979.

[360] Q. Could you identify plaintiff's exhibit 52?

A. Yes, ma'am; this is the letter which was mailed over the signature of candidate Valentine to "neighbors" in Wilson, Halifax, Nash and Edgecombe counties. The important points from the standpoint of racial telegraphing are at the bottom of the page, page one, final paragraph.

The seemingly well-organized block vote—so much so, the point here, block is spelled correctly, b-l-o-c, the bloc vote, but for purposes of this letter, the word bloc has been misspelled b-l-o-c-k so that any kind of casual reading of this letter could, in fact, be seen as the well-organized black vote. That is the meaning of part one of that sentence.

[361] Judge Phillips: Do you have an opinion based upon your expertise as to any significance as bearing upon racial appeals of any of the material in plaintiff's exhibit 52?

The Witness: Yes, sir.

Judge Phillips: What is it?

The Witness: If you and your white friends don't vote on July 27, my opponent's black vote will decide the election for you.

Judge Phillips: What particular parts of that exhibit do you point to that are supporting that opinion?

[362] The Witness: I point to the top of page two of exhibit 52, and to the final paragraph on page one.

[365] By Ms. Guinier:

Q. You have described a letter sent out by the Valentine for Congress campaign entitled "Dear Neighbor." Do you also have the letter which is attached to plaintiff's exhibit 52 which was sent out by the Valentine for Congress campaign that is addressed, "Dear Fellow Democrats"?

A. Yes, I do.

[366] Judge Phillips: Will you identify it by reference to the exhibit?

The Witness: Yes; I have it as number 52(b).

"... Dear Fellow Democrat: Tuesday, July 27 is an important date for Democrats in Durham County."

The final two paragraphs of the first page of that exhibit, read:

"... Our polls indicate that the same *well-organized block vote* which was so obvious and influential in the first primary *will turn out again* on July 27. My opponent will again be *busing his supporters* to the polling places in record numbers. If you and your friends don't vote on July 27, my opponent's *block vote will decide the election* for you."

By Ms. Guinier:

Q. Dr. Luebke, can you interpret those particular portions that you have just read?

Judge Phillips: Can you give an opinion as to their capacity to convey a racial appeal in the context?

[367] The Witness: Yes; I can give an opinion.

By Ms. Guinier:

Q. Would you, please?

A. Yes. My opinion is that this is urging white voters to take note of black voters' prior participation in the first primary and that if you and your white friends don't vote on July 27, my opponent's black bloc vote will decide the election for you.

. . . . .

[385] Judge Phillips: (Interposing) Try to respond to the question. What, in your opinion, in this particular exhibit constitutes a racial appeal?

The Witness: In context, sir, the picture and the three final sentences of the advertisement.

By Ms. Guinier:

Q. Can you describe the picture?

[386] A. Yes. The picture is of Governor Hunt and Reverend Jesse Jackson meeting in the executive mansion on March 11, 1983—on March 11th.

Q. Can you or would you please read the three sentences that in your opinion are a racial appeal?

A. "... We must register at least 200,000 black voters in North Carolina in the next two months (Jesse Jackson). Governor James B. Hunt, Jr. wants the state board of elections to boost minority voter registration in North Carolina,"

From the Chapel Hill newspaper.

Third, the text of the ad:

"... Ask yourself, 'is this a proper use of taxpayers' funds?'"

Q. Why, in your opinion, is the picture a racial appeal?

A. It is a racial appeal because it is drawing to the attention of the public that an opponent or likely opponent has a controversial black leader in his office.

Q. In your opinion, what about the three sentences that you read is a racial appeal?

A. The three sentences which I read draw attention to the fact that black voters are being registered. And it questions whether or not it is legitimate for a [387] Governor to support the voter registration of blacks.

. . . . .

Q. Can you compare the cartoons in plaintiffs' exhibits 22 and 23 with the political advertisement in plaintiffs' exhibit 53(c)?

A. Yes.

. . . . .

[388] The Witness: I compare exhibits 22 and 23 and 53(c) and see in the two what I refer to as continuity in racial politics.

By Ms. Guinier:

Q. What do you mean by that?

A. By "continuity," I mean that themes which were extremely overt in exhibits 22 and 23, which I recall to be 1898, are subtle—more subtle—in 1983. And yet the content of the exhibit shows similarities.

That is, the question is being raised whether it is legitimate for a Governor who is white to be meeting with a

political leader—controversial political leader—who is black.

[402] Q. The significance in relation to the participation of blacks and whites in the State of North Carolina?

A. There is a truism—

Judge Phillips: (Interposing) No; no. Just answer her question, Mr. Witness, if you will. It will go along much better.

The Witness: Thank you. Could you repeat the question?

By Ms. Guinier:

Q. Yes. What is the significance between the data that you have examined regarding the demographic status of blacks and whites in the State of North Carolina and the participation by blacks and whites in the political process in this state?

A. The significance is that for all the socioeconomic measures which I have reviewed, the socioeconomic status of blacks is lower than the socioeconomic status of whites.

Q. What is the significance of that to the participation by blacks and whites in the political process in North Carolina?

A. The significance of that is that a fundamental finding of political sociology for the United States is that the lower one's socioeconomic status the less [403] likely one is to participate in the political process.

[412] CROSS-EXAMINATION 9:55 A.M.

By Mr. Leonard:

[418] Q. Is it your testimony, Dr. Luebke, that two people looking at a political ad which opposes the busing of

school children—that no person could draw a reasonable inference that that is not a racial appeal?

A. I have testified about racial appeal in the context of the definition which I use in my work. And your question is too vague for me because I don't have any examples to comment as to whether or not it is a racial appeal.

Q. You have testified that you used quantitative methodologies in your professional experience?

A. Uh-huh.

Q. Tell the Court what quantitative methodologies you used in coming to your opinion with respect to the racial appeals in the various campaigns that you have testified to?

A. The racial appeals which I have testified about are based on case study analysis. Those are not quantitative studies.

Q. Have you interviewed specific individuals to determine the impact of the claimed racial appeal in those elections?

[419] A. I have not relied on my interviews with anyone to draw my conclusions concerning specific documents which I have been discussing.

Q. So the answer to my question is "no"?

A. Yes—yes, no.

Q. Yes, the answer to my question is "no"; is that correct?

A. I will be 100 percent sure if you repeat that question. Then I will try to give you that straight "yes-no" that you are asking for.

Q. Dr. Luebke, is the answer to the question I propounded to you "yes" or "no"?



A. But I don't remember that question to which you want a "yes-no" answer.

Q. Well, viewing the state of the record, I will leave that question where it is.

(Pause.)

Dr. Luebke, is it fair political comment for one candidate running for a public office to lay out in a political ad his background and political experience versus his opponent's?

A. Yes.

Q. And if he compares the public service of the two candidates, is that fair comment?

A. Yes.

• • • • •  
[422] Q. Do those organizations or groups ordinarily put out a piece of literature in which they carry the pictures and some information about the slate they are supporting?

A. Yes. It is common.

Q. And is there anything in exhibit 51, which is the ad in Durham County for the county board of commissioners of the May 6, 1980, election, other than the pictures of the five candidates that you found to be racially telegraphing or racial telegraphing?

A. Yes.

Q. What else?

A. Based on my experience as a political sociologist referring to—

Q. (Interposing) We know what your experience is. Just tell me what else in the ad is a racial telegraph other than the pictures of the candidates, please.

A. Yes. "Vote for continued progress in Durham County" had meaning in the context of 1970-1980 political context of Durham County.

Q. Were any of these candidates incumbents?

A. Yes.

Q. It is not likely that a candidate for public office seeking re-election would use the terminology [423] "continue your progress by supporting me"?

A. In Durham County, the appearance of this ad on May 4, 1980, is no accident.

Q. Dr. Luebke, I ask you: Is it not usual in politics for an incumbent seeking re-election to use terminology asking the electorate to support him for continued progress?

A. Yes. The word "progress" can be used.

Q. Now, do you know who Bill Bell is?

A. Yes.

Q. Who is he?

A. He is the chairman of the county commissioners in Durham County.

Q. The chairman of the county board of commissioners in Durham County?

A. Yes.

Q. And when was he elected last?

A. He was last elected in 1982.

Q. And when was he elected before that?

A. I believe Mr. Bell was first elected in 1972.

Q. Was he elected in the election of 1980?

A. He was.

Q. Do you know Eleanor Spaulding?

A. Yes, sir.

Q. Is she a member of the county board of [424] commissioners of Durham County?

A. She is.

Q. Was she elected or re-elected in the election in 1980?

A. She was.

Q. Is it correct, Doctor Luebke, that in the election in which this ad was used as one of the tools for this slate that there were two black people elected to the county board of commissioners in Durham County?

A. Yes.

Judge Britt: What is your answer?

The witness: Yes.

Judge Britt: You have got to speak out so the reporter can get it down, Mr. Witness.

The witness: I am sorry, sir—yes.

By Mr. Leonard:

Q. Now, how does one go about getting elected chairman of the county board in Durham County?

A. It is a vote of the five incumbent commissioners when they convene the new county commission.

Q. So if there is a contest, the winner has to have at least three votes; is that right?

A. That is right.

Q. And if Mr. Bell is the chairman of the county board, he had to have at least three votes to become [425] chairman; correct?

A. That is correct.

Q. Now, what is the mathematical possibility that he could have been elected chairman of the county board of Durham County without white support?

A. Which question are you asking, sir—concerning the election or concerning his election of county commission—to the chair of the county commission? Those are two separate votes. One is a vote of the county commission. One is a vote of the people.

Q. What is the mathematical possibility, Dr. Luebke, that Mr. Bill Bell could have been elected chairman of the county board of supervisors in Durham County without white support in the election for chairman?

A. Zero.

Mr. Leonard: That is all I have.

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REDIRECT EXAMINATION 10:16 A.M.

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[426] By Ms. Guinier:

Q. Is it usual for a candidate to put a picture of his opponent in his own political advertisement?

A. It is highly unusual. It represents free publicity under normal circumstances.

Q. Now, directing your attention back to plaintiffs' Exhibit 51?

A. Yes.

Q. What was the significance in your opinion to the use of the word "progress" in that political advertisement?

A. "Continued progress" is a statement in the context of the November 1979 city council election in which an all-white slate was elected to the Durham city council. The term "progress" was used consistently in [427] that cam-

campaign for public office—the city council campaign. And “continued progress” is a reference to that success—that electoral success by that all-white slate.

. . . . .

**Phyllis D. Lynch**

was called as a witness, duly sworn and testified as follows:)

DIRECT EXAMINATION 10:20 A.M.

By Ms. Guinier:

. . . . .

[429] Q. Are you involved in electoral politics in Charlotte-Mecklenburg?

A. I am.

Q. In what capacity?

A. I am chairman of the Mecklenburg County Board of Elections. And I also serve as a member of the black political caucus and belong to the caucus' issues and candidates committee.

Q. How long have you been involved in electoral politics?

A. I have been involved approximately 18 years.

Q. When did you first register to vote?

A. When I was—in 1968.

. . . . .

[431] Q. Now, have you encountered any problems as a member of the black political caucus or in your involvement in electoral politics in getting out the black vote?

A. Yes.

Q. What are those problems?

[432] A. Traditionally, the black community has not been encouraged to participate in the electoral process. Many people still feel that literacy test, poll tax—things that have been removed—are still in existence. And it is a very slow process to try to educate people that there need not be a fear of using the voting machine or going down to vote.

We encounter as we go to talk to individuals in various places about registration that older people tend to feel that they had in prior years been told by the whites that they work for that there was really no need to take an active involvement in local government; that they would take care of that for them; anything they needed, to contact them.

Many people feel that if the husband is registered to vote, the wife does not need to register to vote; and that their children should stay in their place and not try to cause any trouble. And there has been resistance by blacks to vote because they felt threatened in some degree.

Q. When you say “threatened,” what do you mean?

A. Well, you weren't encouraged to participate. And to some people it is looked at that if you go out and try to get people elected to office, that they are not going to respond to you anyway if they are white; and if [433] they are black, that they are going to going to have conformed to the degree that they don't relate to you anyway.

Q. You said that a low to medium number of whites would vote for a black candidate. What following does a black candidate need to get those white supporters?

A. The issues and candidates committee has looked at this very closely because everyone looks for success. Success in politics is viewed as actually a victory in getting people elected. So in looking at this and inquiring, we have found that whites tend to want blacks to be the pro-



fessions, high echelon, have high visibility. And that is very difficult to acquire.

Blacks have not been in traditional leadership roles in the community. So we have not had an opportunity to demonstrate our ability to provide the kind of leadership that people feel that they want to vote for a person for.

[435] Q. In your opinion, how many times does a black candidate have to run before they are elected?

A. Unless it is a very unusual circumstance or a person who has been extremely visible and successful in some capacity, generally at least two times.

Q. Is this also true of a white candidate who is running for the state house or state senate?

A. No. There have been white candidates who have at their first try been able to make it that would have had fairly equal credentials to blacks who have tried at the same time.

Q. Have those blacks with the same credentials won?

A. No. They have not won.

Q. How, in your experience, is a black candidate received in the white community?

A. Very seldom.

Q. What do you mean by that?

A. Well, I mean that the opportunity—the city of [436] Charlotte, as can be seen by the exhibit that you had me point to originally, shows that the black community is still isolated. We are a progressive city working toward trying to improve that. But at this time, however, we still have approximately 90-plus percent of the black community residing on the west side of town.

So it is very difficult if you live on one side of town, go to a black church, socialize at a black club, to be invited over to the white side of town where the white church is, the white clubs, *et cetera*; so that it is very seldom.

Q. Are there any other problems that a black candidate has in getting exposure in the white community?

A. Yes. The mere fact that, as I mentioned a minute ago, we are still somewhat a—the mere fact that I can sit here and say that there is a white side of town and a black side of town shows that there are some problems that are related specifically to race.

Therefore, individuals who are black and who are seeking exposure to get elected have to try to figure out how to get invited to various affairs in the white community, have to figure out how they can convince the white constituent that they are indeed capable of providing leadership.

Generally, there are no blacks that I know of [437] who have headed United Way campaign drives, airport bonds or things of this nature that would give them the exposure that the white community normally looks at from the standpoint of leadership. Most whites who are running for office have been heads of different committees or have very active roles in leadership positions, demonstrating therefore to the community that they have the ability to sit on these elective bodies, make decisions and govern affairs.

It is difficult for blacks to demonstrate that when they have not had the opportunity to have the same positions in the community.

Q. Is there any problem in terms of raising money?

A. There will be tremendous problems with raising money. This is one of the things that when we counsel blacks from the caucus' committee that we emphasize—that it will take a great deal of money and time and a commitment on the candidate's part—the prospective candidate's

part—to make several sacrifices and more than likely contributing money on their own.

Q. Is the problem limited to just raising money?

A. No. Not only do you have to raise money, but you have to figure out the wisest way to expend that money from the standpoint of using effective publicity [438] about your candidacy and being able to get out into the respective community with your concerns.

Q. Can you give me an example of what you are talking about in terms of trying to figure out the wisest way to spend the money?

A. An example would be that in Dr. Bertha Maxwell's campaign, she was running for the first female—black female—to run for the North Carolina State House of Representatives. In the formulation of her strategy the idea was to use her as a test case to see whether or not we could bring together what was viewed as very successful in anybody's campaign—in talking with white public relations firms, what would she need to remove these barriers.

We sought her to run. She had experience from the standpoint of being visible in the community, having worked with the school system, having been a professor at the University of North Carolina at Charlotte. Having the title of "doctor" to help legitimize her credentials.

We raised with her assistance well over \$20,000 that was used primarily to purchase large billboards to be put in the white community, the downtown community; to buy radio and newspaper advertisements; to present her as a first-class candidate.

[440] FURTHER PROCEEDINGS 10:55 A.M.

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Q. What was the outcome of Dr. Maxwell's candidacy?

[441] A. Dr. Maxwell was victorious in the primary and defeated in the general election.

Q. What year was that?

A. 1980—I am sorry—this past election, which was 1982 or 1981, whenever the last general election. This is 1983. So it would probably be in 1981, I guess.

Q. What has been your experience in getting white politicians to support the candidacy of a black?

A. It has been difficult over the years in trying to get white politicians to support black candidates.

Q. In your experience with the issues and candidates committee, do you have a particular function?

A. Yes. I help to invite white candidates in and set up appointments for them to speak with the entire body.

Q. What has been your experience in attempting to forge coalitions with white politicians?

A. The coalitions have not been successful, because a number of blacks that we have tried to run have not won.

Q. Why have the blacks that you have tried to elect not won?

A. They did not get white votes.

Q. Are there any other factors that contribute to the difficulty in getting blacks elected to office in [442] Mecklenburg County in addition to those that you mentioned?

A. The biggest factor is getting exposure and convincing the white voter that there is nothing to fear from having blacks in elective office.

Q. Is there any difficulty in creating a pool of available or willing candidates?

A. There is an awful lot of difficulty because, as I mentioned earlier, success is the factor through which you can



get people encouraged to run. When black candidates—when we are unable to point out to black candidates a number of victories, then they don't want to necessarily take the time.

It is difficult because, number one, you have to identify a black who can financially go to serve in these respective offices. Because of the economic situations, many blacks are not in positions—they are not in jobs that they can be released from those jobs in order to serve.

Because the positions in North Carolina as a whole pay really just expenses and a very small amount of money to those people who serve, you would have to be fairly well off to offer yourself as a candidate. Many blacks, not being in that situation—we have to figure out a way that they can be released from the positions [443] they hold and can financially subsidize their income.

We also have to, because we have not had the experience of running different campaigns, get people in that can help them from that standpoint.

Q. What about encouraging people who have sought office and have been defeated?

A. Well, after you have run two or three times and have not won, you sort of lose your desire to serve.

Q. Do you have any particular examples that you can point to?

A. Dr. Bertha Maxwell will not run again. Jim Ross, who was a candidate for the House, will not run again. There are a number of other people who have indicated that they would not run for those reasons; or in the process of trying to win have gone to their heavenly father.

Q. Now, when you say they have indicated that they would not run for those reasons, what reasons are you referring to?

A. The difficulty in attracting the white vote; the difficulty in raising money; the difficulty in projecting yourself to be the type of individual that is acceptable, regardless of the credentials that you have and the status that you have tried to form. Getting out the black vote is a tremendous effort—getting people to register to vote and then follow up with that and actually vote.

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[445] Q. Are these difficulties that you describe for blacks running for city and county races the same as for blacks running for the State House or the State Senate?

A. It appears that it is more difficult to get blacks elected at the State House and Senate level than it is to get them elected at the local school board, city council and county commission level.

Q. Why is that?

A. First of all, it is a countywide or districtwide election. If you are running for the State Senate, you must not only capture the votes in Mecklenburg County, but you then must go into another county to capture—that senatorial district is divided.

If you run for the State House, then you must not only win the city—you have to win the city and the county votes. An example would be in Dr. Maxwell's case, she won enough votes in the city. She lost by some 2,000 votes in the county because it is very difficult the way the county is laid out. As you can see, it is rather densely populated. So a person who must go out in those areas must either have white contacts—which the population is a larger white population than is concentrated in the city.

So you must have contacts out in those areas. [446] And the rural population and their attitudes tend to be a little bit different than the urban area.



Q. Given these problems, what must the black community do to elect a candidate to represent their interest at the State House and State Senate level?

A. They have got to get more black votes to help counteract the fact that they can't get white votes.

Q. In your opinion, it is important to elect a black person to represent the black community?

A. I think it is.

Q. Why is that?

A. First of all, I think that it helps from the standpoint of making people feel that they have got representation. Someone there is going to understand their issues and relate back to it.

When you look at a state race with the candidates going to Raleigh, coming back only on the weekend, a person—a constituent—not living in the white community may never see their elected official. A person living in the black community would have to come back to the black community. And therefore, the likelihood of them being able to relate to the concerns of the people and being able to even get in touch with them is going to be greater.

We live in Mecklenburg County approximately [447] three hours from Raleigh. So the likelihood of blacks being able to go down to Raleigh during the course of the legislature is very thin.

Q. Now, looking again at plaintiffs' exhibit—I believe it is 4(A)—can you identify the area in which most of the white elected officials live in Mecklenburg County? If you want to approach the map if you can't read it—

Judge Phillips: (Interposing) What representatives are you asking her to locate?

Ms. Guinier: The State House.

By Ms. Guinier:

Q. Just give the name of the area.

A. The majority of the delegation, all white, would tend to live in the southeast section of the city of Charlotte, known as the Silk Stocking or Myers Park area.

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[449] CROSS-EXAMINATION 11:08 A.M.

By Mr. Leonard:

Q. Ms. Lynch, as chairman of the—what is it—the issues and candidates committee of the political black caucus for Mecklenburg County?

A. No. I serve as a member of that committee. I am not the chairman of that committee.

Q. Do you from time to time call the Mecklenburg legislative delegation to meetings in Charlotte on the weekends or when the legislature is not in session?

A. I have had occasion to do that. Yes.

Q. Do you know Representative Louise Brennan?

A. I do.

Q. Do you know what her phone number is?

A. I can find it, if that is what you mean.

Q. How about the rest of the delegation? Did you have any trouble finding their phone numbers?

A. No. As chairman of the board of elections, we put out a list that has all those numbers on it. So I could find it.

Q. So you don't have any difficulty getting in touch with these members of the House?

A. It is my role to get in touch with them. So I don't have any difficulty.

[450] Q. Does the political black caucus of Mecklenburg County have any problem getting in touch with these legislators?

A. From the standpoint of knowing the phone numbers and being able to call them—no.

Q. Have they responded when you asked them to come to meetings of the black political caucus?

Ms. Winner: We object to—

Judge Phillips: (Interposing) Overruled.

The witness: We have not been able to get them to the degree that we would feel comfortable. We have had some who are more responsive than others. Yes.

By Mr. Leonard:

Q. Has Representative Brennan been responsive?

A. Yes.

Q. Tell us, in your opinion, of the eight members currently serving from the Mecklenburg delegation who you feel has been responsive to the black political caucus?

Ms. Winner: Your honor, can we have a standing objection to the relevancy of questions on responsiveness so that we don't have to keep interrupting the testimony.

Judge Phillips: Well, why don't you state [451] the basis? Do you take the position that there is no relevance to issues of responsiveness because there is a footnote in the report that says that unresponsiveness is sought to be proven and responsiveness can be shown in rebuttal? Is that the basis of your objection?

Ms. Winner: That is the general basis of the opinion. I think the Senate report makes clear that it is the objec-

tive rather than the more subjective factors of responsiveness that are being considered; and that only if the plaintiff is attempting to prove unresponsiveness may the defendant rebut by proving responsiveness.

Judge Phillips: We will overrule the objection on that basis—that is, the objective that the evidence of responsiveness is not relevant, there being no evidence in the case of unresponsiveness from the plaintiffs' side. That objection is overruled and on a continuing basis.

Ms. Winner: Thank you.

Judge Phillips: Also, this is cross-examination. And it seems to me that the line of direct examination which inquired very specifically in matters of access to representatives has opened this matter for cross-examination irrespective of responsiveness and unresponsiveness. You may proceed.

[452] By Mr. Leonard:

Q. So you find no difficulty—I am sorry. I forgot the question. Of the eight members of the Mecklenburg House delegation, tell us those whom you have no difficulty making contact with. Ms. Lynch, when I say "you," I mean not only you because of your position as chairman of the board of elections, but the black political caucus and those committees which involve themselves with state legislative matters.

A. The black representative Phil Berry would be the most responsive in that he attends the black political caucus meetings and on a regular basis updates us on legislation that he feels is relevant to the needs of the black community or issues that he feels that he would like some input from us as to what our position would be.

Q. Excuse me. Let me interrupt for just one moment. We will have you go on in just a minute. But in his role as a member of the caucus, does Representative Berry

serve as a liaison between the black political caucus and the Mecklenburg delegation?

A. Not in an official capacity. I am sure that he would be able to—if asked, I guess, by the delegation—do so. But we have not asked him to do so.

Q. Well, does he ever indicate to you at your meetings that he discusses these issues on the agenda [453] of your committee with other members of the delegation?

A. I would—I can remember a couple of incidents that I have heard him say that—I think they have delegation meetings. And I would assume that in some of those meetings he has indicated concerns.

Q. Tell us what other members of the delegation are available to you when you look for them or seek them out.

A. In terms of trying to write them, I guess they would all be equal beyond his level, because generally if we do not call them we don't hear from them.

Q. When you call them, do they respond to your requests?

A. From the standpoint of being courteous and taking a telephone message—yes; from the standpoint of necessarily voting in the manner in which we have requested—that could be debatable. And in fairness, we would have to look at each particular issue that we have asked them to consider.

Q. Does the Mecklenburg County political caucus keep a roll call of the eight House members during a session to determine whether they vote for or against the interests of the black political caucus from the county?

A. Not an official tally. We have several people that serve as—I guess you would call it monitors. And [454] they have the information. This information is then brought to the committee when we get ready to make endorsements or whatever.

Q. In the 1982 Democratic primary in Mecklenburg County, how many candidates that the black political caucus endorsed won in the primary?

A. You mean the entire—every office?

Q. For the House?

A. Oh, for the House. I think all that we endorsed for the primary won.

Q. Let me remind you that I believe Mr. Richardson ran well in 1982; didn't he?

A. Well, he won the primary. He didn't win the general.

Q. And in the general election, how many of the candidates that were endorsed by the caucus won?

A. All but Mr. Richardson.

Q. Now, Ms. Lynch—

A. (Interposing) Might I state, too, for clarity: We endorsed the Democratic ticket, which consisted of six whites and two blacks. So six whites won and one black for the House.

Q. In the general election for the House?

A. In the general election for the House.

Q. And in the primary election for the House in [455] 1982, you also endorsed six blacks and two whites; did you not?

A. No. We endorsed the other way around. We endorsed six whites and two blacks.

Q. Did I misstate that? I am sorry. How many votes did Mr. Richardson lose by in the general election in 1982?

A. 250 votes.

Q. Out of how many?



A. I think he got 12,000-14,000. I am not really sure.

Q. How many times had he run for public office before?

A. He had not run. This was his first try for public office.

Q. For any public office?

A. For any public office.

[461] Q. In your experience as chairman of the Mecklenburg County board of elections, do you perceive, Ms. Lynch, that black people have any difficulty fully and completely participating in the political process in Mecklenburg County?

A. Yes. I feel that black people do have some problems in participating fully in the electoral process.

Q. Be very specific, if you would, with the court. And tell us what those are.

A. Simply that history and tradition has not encouraged the black citizens of Mecklenburg County to register and vote; that many people, as I stated before, are still afraid of what they will have to face. The literacy rate in Mecklenburg County is about 50,000 [462] people that are illiterate. Many of those live in the black community. And many people still feel that they will be asked to read or write something in order to register to vote. The biggest problem we have to overcome is to assure them that that is not the case. And it is a slow process in doing that. But once it is done, then they tend to come out.

Q. Did the State Board of Elections recently run a program called a citizens awareness program relating to the registration of voters in the state?

A. Did indeed.

Q. Was Mecklenburg County a major focus of that campaign?

A. Mecklenburg County was a major focus of that campaign.

Q. Did that campaign result in a substantial increase in the number of black voters who were registered to vote in the county?

A. It had—a number of people were registered. But in view of the fact that there are more unregistered—

Q. (Interposing) Excuse me.

A. I will have to say no. It did not result in substantial, because there are over 35,000 unregistered.

Q. So there are still 35,000 black people who are eligible to vote but who are not registered?

[463] A. That is correct.

Q. Did that campaign have any impact on your opinion with respect to the fears and the impediments to blacks in registering to vote?

A. The campaign showed that there was going to be—in Mecklenburg County, we try to make voting or registration accessible to everyone. This is what makes it so frustrating that many people still hold these myths to be true, because it still makes it difficult to get people to register with a county that has well over 50 percent of its eligible population which are black still unregistered.

Q. Well, it is a myth; isn't it?

A. Well, I know it to be a myth since the rule is a rule. But in trying to convince people who don't know it to be a myth and who are still questioning whether or not they will reap some reprisal as a result of that, we run into people that have served in prison or something. And they are concerned about how they can become full citizens again.

Q. Certainly one of the things you have done, Ms. Lynch, with respect to getting greater black participation and registration is the vote task force?

A. Correct.

Q. And Mr. Reid, who I understand is the next [464] witness, is the chairman of that?

A. That is correct.

Q. Would you point to that as one of the major efforts that you have undertaken in Mecklenburg County?

A. I would indeed.

Q. Would you say overall that the effort by the State Board of Elections was one which was designed to try to improve the participation by blacks in the process?

A. Certainly.

Q. Incidentally, you actively supported representative Louise Brennan in the last election; didn't you?

A. I supported the Democratic ticket, of which she was a part.

Q. Did you support her in the primary?

A. I supported the—yes; I did. I supported all incumbents.

Q. Did you support Susan Green for county commissioner?

A. I did.

Q. Did you support Pam Patterson for city council?

A. She is my district councilperson. I did.

Q. Did you support Ben Tyson for the State Senate?

A. Ben Tyson—yes; I did.

Q. I am sorry—Tyson. Did you support Betty [465] Chapin for the city council?

A. Yes; I did.

Q. Are all those people white?

A. All those people are white.

Mr. Leonard: That is all.

Ms. Guinier: We have no redirect, your honor.

Judge Phillips: Thank you, Ms. Lynch.

Judge Dupree: Let me ask a question.

#### EXAMINATION

By Judge Dupree:

Q. You are chairman of the Mecklenburg County board of elections?

A. Yes, sir.

Q. How long have you held a position on the board?

A. I have been the chairman going into my third year.

[467] Q. Now, this candidate, Dr. Maxwell—she was a professor at the University of North Carolina at Charlotte?

A. She is.

Q. Was this the first time that she had run for public office?

A. It is the first time she had run for public office.

Q. And you say that she does not plan to run again?

A. She does not.

Q. Do you know offhand about how her experience in losing the first time out compares with the candidates of the other race who lose the first time out?

A. From the standpoint of money and visibility, as I stated earlier, we try to assess what a first-timer goes through—which is generally a hard time—getting visibility, raising money.

We raised over \$20,000, which is a very large amount for a State House race in a county like Mecklenburg, in order to give her the edge. In comparison, we have had whites who have had less visibility than Dr. Maxwell, live in other areas of the community and were still unable to—she was unable to get elected. And they [468] were elected. Representative Black is one example.

Q. Let me ask you this question: Have you ever known a white to get defeated the first time out?

A. Not with the money and everything that she had—no. But I have known of whites who have lost. But it was generally because they didn't have money or visibility or inroads in the community.

Q. I am just interested in whether or not it is normal for a person who runs in Mecklenburg County to get elected the first time out, regardless of race.

A. Depending on the kind of campaign—there are serious candidates for office. And then there are people that just sort of want to get out there to get a little exposure. And maybe they intend to run for another office.

We felt that in Dr. Maxwell's case she was sort of a test project; that many people have assessed for us why black candidates lose. Their assessment generally is, "well, you all didn't raise enough money. You didn't let the person receive the kind of visibility they needed," *et cetera, et cetera*.

So Dr. Maxwell was our test case. She was very well known in the Charlotte area. She was very well liked in the Charlotte community. We got the money. We got the publicity that they advised us. Maybe we just [469] had the wrong consultant. But we followed the advice that was outlined to aspire you to victory.

Q. She sounds like a highly qualified candidate.

A. She is.

[470]

Samuel L. Reid

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 11:40 A.M.

By Ms. Guinier:

[472] Q. Have you been involved in electoral politics in Charlotte?

A. Yes; I have.

Q. In what capacity?

A. Last capacity as precinct chairman; second vice chairman of the Democratic party, Mecklenburg County; special registrar for the board of elections, Mecklenburg County; and at present, chairman of the vote task force.

Q. What is the vote task force?

A. The vote task force is an outgrowth of a committee of the black political caucus which is comprised of volunteer workers that are concerned about the participation of blacks in the political process.

Q. How long has the vote task force been in existence?



A. As an official organization, since 1979—'78.

Q. Prior to that time?

A. It was a committee actively encouraging people to register and vote and trying to stimulate political involvement.

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[479] CROSS EXAMINATION 11:52 A.M.

By Mr. Leonard:

Q. Mr. Reid, how long has your vote task force project been in existence?

A. Since 1978.

Q. Tell us specifically where you go to register voters and the procedure of going about doing it.

A. We go all over the city at request. But we initiate drives primarily in the black community whereas there is a need for our type services of making voter registration more accessible to them.

We are special registrars. We make requests on a two day or a one-day notice to the board in writing that we are going to be at a certain place at a certain time. Before the special registrars, you would have to make a written request 14 days prior to the drive. And therefore, a lot of people felt that—a lot of [480] organizations that we come in contact with plan tonight and want to execute the drive next week or tomorrow, which is under the guidelines.

Q. Tell us some of the places that you have taken your vote task force.

A. We work Memorial stadium at the soccer games. We have registered at gay rallies. We registered at the festival in the park—just about any and everywhere. And most of

our requests come from the black community. But we are open and we initiate drives in all communities.

Q. Put for instance, if a black church is having a picnic on a Sunday, you make a request to send the vote task force to the picnic? And you can register people?

A. They make the request.

Q. They make the request to you or to the board?

A. To me. At times they make it to the board. And the board referred them to me if it is not before 14 days.

Q. Do you have any difficulty when those requests are made getting approval from the board?

A. No.

Q. Did you have any difficulty getting members of your task force group to go those locations?

A. None.

Q. How many members on your task force?

[481] A. Approximately 15 to 20. Sometimes it swells up to 50.

Q. Any of them white?

A. Yes.

Q. How many of the 50?

A. Approximately 15.

Q. Do you have any difficulty getting those white members to go to the black functions to register people?

A. No—not once we pair them off in communities. Are you talking community drives or clubs or what?

Q. Anybody?

A. No.

Q. Do you ever get any requests from white groups?

A. Yes.

Q. Give us some examples.

A. We did one for the gay and lesbian liberation, UNCC campus. We done one for the gay, I think, liberation. It was a club request—the Odyssey club. And we done some for Sane. We have done a few for a couple other community organizations. I can't think of the names right now.

Q. How many blacks have been registered in Mecklenburg County since you started your—that is, new black voters have been registered—since you started your project a few years back?

[482] A. I would say between 6,000 to 7,000.

Q. I may have misunderstood you. But did you say 6,000 to 7,000?

A. Correct.

Q. Did you take your vote task force into any of the businesses or industrial plants or work places in the county?

A. No; we haven't. That is something we are working on.

Q. That is part of the overall state board of elections commission program, though; isn't it?

A. Yes.

Q. Are you part of that?

A. No; I am not. I am a special registrar. I do not deal—the board initiates it. As far as high school registration and all those, those are the board of elections functions.

Q. Are those separate functions from the vote task force?

A. Yes.

Q. So you are not familiar with those?

A. I know the board has registration within the city concerning high schools and businesses.

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[484] Q. I think everybody would agree you are doing a great job on a volunteer basis. And you have been registering blacks in Mecklenburg County at a faster rate than the whites have been registered; have you not?

A. Correct. That is due because the requests are coming in more readily now from the black community.

Q. On election day what does the vote task force do?

A. Basically we use the same technique we use in getting people to register. We go into communities, put on workshops, letting them know there is nothing to be afraid of to use the voting machine.

We knock on doors and remind them to go vote, offer transportation if they need it in the elections community.

Q. And specifically on election day you transport people to the polls; do you not?

A. We help in that way. We offer rides.

Q. And if I lived in Mecklenburg County and couldn't get to the polls and called the board of elections, they would give me your vote task force phone number; right?

A. Right.

[485] Q. And the newspaper publishes that number?

A. Correct.

Q. So anybody in Mecklenburg County who doesn't have transportation can use the resources of the vote task force?

A. Correct.

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[494] (Whereupon,

**Robert W. Spearman**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 12:15 P.M.

By Mr. Leonard:

[497] Q. Do you now hold a political appointment in the State of North Carolina?

A. Yes. I am now chairman of the North Carolina state elections board.

[510] A. Well, I became a member of the state board of elections on November 9th, 1981. Shortly before that, I had been asked by Governor Hunt if I would be willing to serve in that position. And I had told him that I would be and I was interested in it.

And I talked with him some at that point about what I perceived to be a need to try to increase voter registration levels in North Carolina.

[511] Then the board members were sworn in on November 9th, 1981. And the topic of voter registration was one of the first items discussed at the first meeting on that day within the board meeting.

Q. Do you recall what the voter registration statistics for whites and non-whites were in the state in November of 1981?

A. Well, of persons eligible to register, approximately 58.6 percent were, in fact, registered at that time. And I believe some of the exhibits have that broken down by race. The percentage of eligible persons registered was higher

among the white population than among the black population.

Approximately 63 percent of voting age whites were registered, whereas approximately 42.7 percent of voting age blacks were registered.

[543] CROSS-EXAMINATION 2:57 P.M.

By Ms. Winner:

[551] Q. All right. Now, you have had complaints from black citizens around the state about problems they have had with their local boards of elections; have you not?

A. I have had some.

Q. And in fact, you have had some complaints out of Durham County; haven't you?

A. Yes.

Q. And the Durham county board is all white; isn't it?

[571] Q. But there was a 20 percent gap between the black registered voters and the white registered voters in 1982; wasn't there?

A. There was a gap of approximately 20 percent when one compares the percentage of white persons of voting age who were registered with the percentage of black persons of voting age who were registered.

Q. At the beginning of 1982?

A. As of February 1982; right.

Q. So if you register 1 percent of those a year, it will take 20 years to close that gap; is that right?



A. If you made up what you describe as—if you closed 1/20th of the gap every year, it would take 20 years. Yes.

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[584] REDIRECT EXAMINATION

By Mr. Leonard:

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[585] A. Well, according to the figures I am looking at, the total white registration on October 6, 1980, was 2,313,722.

Q. Correct. And what was it on—

A. (Interposing) On October 4, 1982, the total white registration was 2,201,189.

Q. Now, would you subtract the—

A. (Interposing) Well, the difference is approximately 112,000, except it is 112,000 fewer whites registered in October '82 than October '80, according to these figures.

Q. So while the black registration went up between 1980 and '82 by 12,096, the white registration dropped by 112,533; is that correct?

A. That is correct.

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[589] Q. So that is it correct to state that the actual substantive or proportional increase of registration for blacks is higher than it is for whites?

A. Yes—of the increase.

Q. Of the increase?

[590] A. In other words, of the increase blacks registered in an amount greater than their proportion in the population.

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(Whereupon,

**Larry Bunnell Little**

was called as a witness, duly sworn, and testified as follows:)

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[592] Q. Do you currently hold any elective positions?

A. I am the alderman of the north ward, Winston-Salem.

Q. What is the racial composition of that ward?

A. My ward is approximately 75 percent black.

Q. Do you hold any special positions on the board of aldermen of Winston-Salem?

A. I serve as chairman of the aldermen's public works committee and vice chairman of the aldermen's general committee.

Q. How did you get selection for those positions?

A. Well, there were recommendations and votes by the committee members. The mayor made recommendations. Then the committee members and the full board had the final say-so in the adoption of those recommendations.

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[593] Three members are black, one white. And the general committee is also three blacks and one white.

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[595] Q. What is the level of interracial social mixing in Forsyth County?

[596] A. I don't know how to really qualify that. I can only say my own personal experience from having been born and reared in Winston-Salem. Essentially we are a segregated town to the extent that the black community primarily lives in the east section of the city. And it is

referred to not as the black community, but as East Winston.

And the living patterns for whites, of course, are in the western parts of the city. There are some exceptions because blacks do, in fact, live in the western part, but in very, very small and rare instances.

Insofar as organizations or country clubs, they are still all white. And religiously probably—well, blacks attend black churches. And whites attend white churches with the rare exception perhaps being a few blacks attending the Catholic church.

Social clubs—there are black social clubs. And there are white social clubs. And that is not a lot of interracial gathering taking place there.

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[617] Q. Did any of those people win in 1978? Did any of those black candidates win in 1978?

A. No. In 1978 all blacks running for office lost in Forsyth County.

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Q. Did any other black citizens run for public [618] office in Forsyth County in 1980 besides Maizie Woodruff?

A. Yes. In 1980 four black candidates sought office. Maizie Woodruff, of course, was seeking reelection to the board of county commissioners. Buford Bailey was seeking to get back on the school board in 1980. Jean Burkins was seeking to get elected to a judgeship. And Ann Brown Kennedy was seeking election to the state house of representatives. She was presently sitting in the general assembly as a result of an appointment to fulfill the unexpired term of Judson Deramus, who had been appointed to a judgeship.

Q. And did a Mr. H. B. Goodson also run for office?

A. Pardon me. In 1980, H. B. Goodson ran for the county commissioners.

Q. What happened to Mr. Goodson's candidacy?

A. In the primary—there were three seats available. And in the first primary Mr. Goodson ran fourth. He ran close enough to call for a runoff election. And he did not call for a runoff election to the county commissioners.

If I may expound on that, I personally as well as a delegation of black leaders in the community went to Mr. Goodson and asked him not to call for a runoff in the [619] '80 county commissioners. Our thinking for that was that we had Jean Burkens running for judge—district court judge. We have never in our history elected a black to a district court judgeship in Forsyth County.

And Ms. Burkens led the first primary in a crowded field. There would certainly be a runoff, because anytime a black is in a second—if a white can qualify for a second runoff against a black, they certainly will. And usually it ends up being some sort of a racial contest.

And the point I make is that we felt that we had the best time in our history to elect a black to the district court judgeship. Her opponent—the person who finished second, Mr. B. R. Browder—we felt could not muster the support necessary to overtake her in a runoff. We felt there was a serious credibility problem. And our own analysis showed us that many people voted for him thinking they were voting for his brother, who was more established in the community.

So our thinking was that if Mr. Goodson called for a runoff in the county commissioners race, the person he would have to challenge—Mr. Neil Bettinger, the president of the Business League of Winston-Salem and a respected person in the community—could marshal his white supporters to the polls.

[620] And they probably—being out there voting for Mr. Bettinger, would probably go along and vote for Browder. So our thinking to Mr. Goodson was it would be difficult to beat Mr. Bettinger. But the other risk involved is that if you bring Bettinger supporters to the poll, that will help Mr. Browder. And we begged him to consider foregoing the runoff election so that in the runoff we would just have two candidates out there. And that would be Ms. Jean Burkens as well as Mr. B. R. Browder for the district court judgeship.

Q. And what happened—

Mr. Leonard: (Interposing) Excuse me, counsel. If the court please, I move to strike that testimony as being highly speculative, based on probabilities certainly beyond this witness' ability to predict probability. And the formal ground is that the testimony is incompetent, irrelevant and immaterial.

Ms. Winner: May I respond to that?

Judge Phillips: You may.

Ms. Winner: The testimony just offered is not offered to show the accuracy of Mr. Little's prediction of what would have happened in that election. I think that that is not material.

The reason that it is offered is to show the dilemma that black people are in in Forsyth County. That [621] is, they have to get a black person not to run in a runoff in order to protect another black candidate; and that that sort of dilemma of black candidates itself is material, whether or not their fear was accurate—or their prediction was accurate.

Judge Phillips: I think we understand the general purpose for which it was offered. And we will overrule the objection and will not strike it. But we will consider it and make a determination of its probative force.

Let me say now that it seems to me to be marching fairly close to the line of relevance. There is just so much in all of the nuances of every political campaign and the thinking that is running through the mind of every candidate and his supporters as it might bear upon the racial problem and the political scene that the court can absorb and try to disentangle.

Ms. Winner: Yes, sir. I understand.

By Ms. Winner:

Q. Was Ms. Burkens successful in the primary?

A. She was successful in the primary. And she won the runoff.

Q. Was she successful in the general election?

A. No. She was defeated in the general election.

• • • • •  
[625] Q. If the city council had been elected at large, would you have won?

A. No; I would not.

Q. Why not?

A. The reason I wouldn't have won is because, first of all, I don't think I could have run. And the reason I don't think I could have won is because I have [626] been in the forefront of a lot of community involvements for better housing, health conditions. And when you are a black leader in Winston-Salem, you are very outspoken. And as a result of being outspoken, you become controversial.

And as a result, it becomes most difficult to receive the white vote. And so usually when we think of running someone at large, the first thing we have to look at is, is the person qualified. And then second, we have to think about someone that will not offend the white citizens or someone



who hasn't been in the forefront of community involvement for public housing and things of this sort.

So we tend to try—when thinking of a county-wide race, we tend to look for someone who has been just marginally involved, so that—well, to coin a phrase, we want a moderate or a lightweight. In past terms, quite frankly, we look for countywide races some that are perceived in many instances in the black community as our competitors to run for office.

Ms. Winner: I don't have any other questions.

#### CROSS-EXAMINATION 9:37 A.M.

By Mr. Leonard:

. . . . .

[628] By Mr. Leonard:

Q. Mr. Little, the court record already shows that this legislative district—house district 39, which is composed of most of Forsyth County other than these two townships, which are Salem Chapel and Belews Creek—is 25.1 percent black. The entire district is 25.1 percent black; and that there are five members from the district, two of whom are black?

A. Yes.

Q. That would indicate to you that the blacks have a greater proportion of the delegation from Forsyth County than is their voting strength; would it not?

A. Yes; that would.

. . . . .

[635] Q. So it was in 1982 that you became aware of the fact that there was an issue concerning multi-member versus single-member districts?

A. Well, I have been aware of the issue. We have talked about the necessity to have single-member districts in the general assembly, on the county commissioners, on the school board and throughout for the last 10 to 15 years, because there is just very little possibility—or at times, we just can't elect anyone at large.

So we have talked about it. Quite frankly, we just never thought it would happen. We just thought we would just never get beyond the talking stages of it. [636] And quite honestly, I was surprised to see it get this far in the general assembly.

When I found out about it, I said, "hey, it is great," because I had discussed it with a lot of black leaders, ministers and others. And so when I found out about it, I immediately called representative Spaulding and asked if there was anything I could do to facilitate the process.

. . . . .

[637] Q. When was that?

A. It was while the debate was going on in the general assembly about proposed districts. I called the senator from our area—senator Dick Bond, who was serving on the committee to discuss that—and told him that the other black members of the board of aldermen as well as the black ministerial association in Winston-Salem strongly favored single-member districts for the state house.

I sent a telegram to representative Spaulding. And we also called representative Margaret Tennille to let her know of our overwhelming sentiments for that. And I also called—well, he wasn't there at that time. But I called C. B. Houser about it.

Q. C. B. wasn't a member of the legislature?

A. No. He wasn't a member of the legislature. But I knew he was running for the legislature. And so I thought I would, you know, give him a call.

Q. What position did C. B. Houser take?

A. When I informed Mr. Houser of the sentiments from the blacks on the board of aldermen and the black ministers, he told me he had not looked at it properly; and that he could see some sentiments for the [638] single-member district.

And I asked him, "well, why don't you make a statement to that effect?" And he said when he first got a glimpse of the single-member district—and he told me in the conversation that he really hadn't studied it that far or thoroughly; but that he—with the information I had given him of the sentiments and how we felt in the community, Mr. Houser said that he agreed with that. But he didn't know how to take a position today that was contrary to what he had said yesterday.

But he would try to figure out a way that he could state his opposition—his preference—for single-member districts. That is what he told me.

I may add, counsel, that after that—that conversation that representative Houser and I had and others talked to him about it—I think he later felt that it would be politically bad for him to take a stand in favor of single-member districts because he said he thought it would cost him white votes. And he needed white votes to win. So he backed away from what he had agreed to do.

• • • • •  
[642] By Judge Dupree:

Q. You referred to a representative Tennille, is it?

[643] A. Yes—Margaret Tennille.

Q. What is her race?

A. White.

Q. And she took the position on the single-member district question that it would be better not to adopt it, since it would enhance the chances of Republicans?

A. Correct.

Q. So as between enhancing the rights or the chances of the blacks and the Republicans, she chose to go with the system that would be against the Republicans?

A. Against the Republicans and against the blacks.

Q. Against the blacks, but instead of going for the blacks?

A. Yes. And quite frankly, your honor, if I may expound, that was a dilemma that we all considered. And we looked at it and said, "we need representation. And we don't need in 1983"—

Q. (Interposing) You were willing to take your chances against the Republicans?

A. Oh, yes. But we just wanted to be in the halls so that we could be a part of the debate. And right now, it is a hit and miss proposition. And most of the times, we miss—as with the school board, the county commissioners. Usually we—as I stated, until last year blacks were not elected to any office in [644] Forsyth County outside of the board of aldermen.

Judge Phillips: Do you think the Democrats and Republicans in Forsyth County might also say that in recent history it has been a hit or miss proposition for them as Democrats or Republicans?

The Witness: Oh, for Republicans it has been less than a hit and miss. For Democrats, it has been almost a sure thing.

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[645] (Whereupon,

**Willie Lovett**

was called as a witness, duly sworn, and testified as follows:)

**DIRECT EXAMINATION 10:02 A.M.**

By Ms. Winner:

[646] Q. Can you describe for the Court your involvement in politics in Durham County?

A. Presently I am chairman of the Durham Committee on the Affairs of Black People. And I have held that position for two and a half or three years. Before that, I was co-chair of the political committee for a couple of years.

I was also the chairman of the Democratic party from 1977 to 1979 and the first vice chair from '79 to '81.

Q. What is the membership of the Durham Committee on the Affairs of Black People?

A. That is a number that I can't give you because I don't know. The way we operate is that any person who is interested can participate in the organization, can get on the mailing list by attending the meetings. So we don't have membership dues as such. So that is difficult to assess.

The impact and the responsiveness in the community to the Durham committee and its recommendations and its programs is rather massive.

[652] Q. Do you think that it is important for black people to have black representatives?

A. First of all, it is important for black people to have representation—what I call true representation, be that black or white.

Q. What does that mean to you?

A. The tendency is that if an elected official does not feel accountable to that segment of the population, then the likelihood of the responsiveness to problems will be diminished as compared to a person who is truly represented by that community in the sense that that community could determine whether or not that person serves or not.

Common sense and actual experience says that that responsiveness would be different. So from that point of view, the black community needs true representation. I think that a black person in most cases would [653] have more first-hand knowledge and would be more accessible in that kind of situation than the typical white person, because the white person is not going to live generally within the inner area of that district. He may be on the fringes of that district.

In addition to that, I think that the perception from the black community itself that "I have a representation. I have somebody that I can go to" is there if that person is black moreso that if that person is white.

So these are realities that we have seen from experience. And I think they are true. And I think that they can be demonstrated.

Q. Have you been involved in any voter registration efforts in Durham County?

A. I have been involved in many voter registration efforts from the days when I was precinct chair in Pearson town precinct, number 34, for about five years; as co-chair of the political committee. And even today we are constantly trying to increase registration and make registration more accessible; but more importantly, to convince citizens that registration is not the major problem that some of them perceive. And this comes as a result of a long history of problems in registration and the treatment that citizens receive when they attempt to [654] register.



So it is two sides to that coin: accessibility in process and procedures and the perception on the part of the citizens who are not registered that this is not that bad. It is not going to be a problem. You aren't going to be intimidated. So we fight both battles in Durham. And we still do.

. . . . .

[655] Q. Can you describe the method or the way one had to—strike that. Can you describe when you were involved in voter registration in the late sixties and early seventies what was the method for registering?

A. Initially when I first became involved, the registration—there were two opportunities to register people: one at the board of elections office at any time, which is typically from 8:00 to 5:00 or whatever. And then there were three Saturdays prior to an election where registrars would be at each of the polling places to register people.

That was basically—those were the two ways that you could register. And this was during the time between 1966 and 1972, most of that time when I was precinct chair.

Later the process was changed so that there could be special registration drives under certain circumstances.

Q. Before you go on, let me ask you a question about the prior period. Did the system of elections and registration at the board of elections pose any particular problems for black people?

A. Well, generally, anytime you have registration being conducted during office hours and most people are working and don't get paid and don't have the opportunity

. . . . .

[664] Q. How does at large voting in Durham County operate as a barrier to the election of black people?

A. At large voting—I guess I can describe that by describing the situation that exists today and try to relate how that ties back to at large voting. But first of all, there is a high degree of—there is a racial issue interjected in most elections in Durham County.

Where there is competition and where we have opponents, the media does a job in that regard that really adds to that situation. The record will show that only a certain percentage of whites tend to vote for black candidates. And that varies depending upon whether there is opposition of not and how well contested it is. But even when there is no opposition, you have a certain percentage of whites who don't vote for black candidates, even though there is no one else to vote for.

Q. When you said the media contributes, what did you mean by that?

[665] A. They tend to build up the racial aspects. In fact, in every article where there is a black candidate running, the point is always made that "Mr. Lovett, who is black." really building up the racial identity of the candidate and really adding to the racial thrust that is already there. And Durham has had a long history of that—the Durham media.

Q. Are there any other barriers that you perceive in an at large system?

A. Well, first of all, you have to run citywide. And that requires more effort on the candidate who is running, more money, cover a broader area. We have some 100,000 people in the city of Durham—in excess of 100,000—108,000. And it covers quite an area.

So from the standpoint of being able to cover the area, it is expensive and time consuming. In addition to that, because of what I said about the tendency for whites in large numbers—and I always say that there are exceptions.

And what I am really talking about is about 20 percent in the best situation would vote for a black candidate based upon the numbers I have seen.

Because of that factor, the perception is that the only way you can win an election is to be able to appeal to a large segment of white voters in order to win. So therefore, you limit the number and types of [666] candidates that you can get to run.

Just to cite the state house as an example, to my knowledge we have only had three persons to run for that position—three, maybe four—three that I know about. And all of those have had similar backgrounds.

Q. What is the background?

A. Well, you need to be in business or you need to be a lawyer. You need to have—the distinction between black candidates and white candidates in that regard—in addition to those two, you have to have something else going for you like a name, well-known, you know; contrasted to white candidates who are lawyers and who have the money and the time to get off, they don't always require that name recognition and the, you know, super kind of person.

And I think the record will speak for that as well, if you look at people who are currently serving in the legislature.

Q. Is there a method of election that you think will solve that problem?

A. Single-member districts, I think, would minimize the problem in the sense that you have a smaller area to deal with. You would have an opportunity—the perception of having to get so many white votes would be minimized to the extent that you would probably have more [667] candidates running.

For example, I would not run because I have—the perception in my mind is because I am so outspoken and really

involved that I couldn't get large numbers of white folk to vote for me. So I would not run for the state house today or tomorrow or any other time in the foreseeable future, as an example.

Q. When you say you wouldn't run, do you mean you would not run in an at-large—

A. (Interposing) That is exactly right.

[694] REDIRECT EXAMINATION 11:28 A.M.

By Ms. Winner:

[695] (Whereupon,

G. K. Butterfield, Jr.

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 11:30 A.M.

By Ms. Winner:

Q. Will you state your name, please?

A. G. K. Butterfield, Jr.

Q. What is your address, Mr. Butterfield?

A. 1001 West Vance Street; Wilson, North Carolina.

Q. How long have you lived in Wilson?

A. I have lived in Wilson all of my life with the exception of a period of time in which I was away for my higher education and when I was in the military.

Q. What is your occupation?

A. I am an attorney.

Q. For the record, what is your race?

[696] A. I am black.

Q. And your age?

A. 36.

Q. What is the racial composition of your clientele?

A. In my law practice?

Q. Yes?

A. I would say 95 percent black.

Q. Do you belong to any professional associations?

A. Yes. I belong to the American Bar Association; the National Bar Association; the North Carolina Association of Black Lawyers, of which I am the president; the North Carolina State Bar. That is about it.

Q. What is the National Bar Association?

A. That is a predominantly black national organization of black attorneys.

Q. Can you describe for the Court your involvement in politics in Wilson County?

Mr. Leonard: If the Court please, so that the record is clear—I believe this issue has come up before. But the state is going to object to any testimony with respect to these covered counties, unless it is offered by the plaintiffs with respect to their 14th Amendment claim versus their statutory claim, on the ground that the statutory issue has been decided [697] pursuant to Section 5 of the Voting Rights Act; and that this Court has no jurisdiction to retry the statutory issues.

Judge Phillips: We will receive the evidence subject to that objection. And we will give a clear indication in any-

thing that we say as to the way we considered the evidence. So you will be protected.

Mr. Leonard: Thank you, your honor.

Ms. Winner: Your honor, perhaps not now—but we were not aware of that issue until we received—actually until a day before we received the brief. May we have some opportunity at some time to address that issue?

Judge Phillips: Before this Court says anything about this issue, there will be an opportunity for both sides to address it with memoranda.

Ms. Winner: Thank you.

By Ms. Winner:

Q. Mr. Butterfield, will you describe your involvement in the electoral politics in Wilson County?

A. I would say that my political involvement goes back to 1953.

Q. How old were you at that time?

A. I was six years of age.

Q. What was your involvement then?

[698] A. My father ran for the board of aldermen in Wilson as the first black to ever offer himself for that position. And so I can probably with accuracy trace the political developments in Wilson from 1953 up to the current time.

Q. What happened to your father's candidacy?

A. In 1953 the city of Wilson utilized single-member districts for the board of aldermen—a pure single-member district plan. We had six aldermen, each elected from a single district.

And my father ran from district 3, which at the time had grown to a population or at least a voter registration of



about 50 percent black. And there was a tie vote for the board of aldermen.

And to resolve the tie, the two names were deposited into a hat. And a child drew names. And my father's name was selected. And so he became a city alderman in 1953.

Q. How long was he a city alderman?

A. They had two-year terms at that time. And of course, they still do have two-year terms. He ran again in 1955 and was re-elected in 1955 from the third ward. And after his second election, he was appointed the chairman of the budget committee for the city. This was in 1955.

[699] Q. What happened to the form of government in the city of Wilson after that?

A. It was changed suddenly between the 1955 and the 1957 election to an at-large system of elections, which is the current system we have today. And he was defeated in 1957.

Q. Did he run at large in 1957?

A. He ran at large in 1957 and came in last place.

Q. When was the next time somebody black was elected to the city council or the board of aldermen of the city of Wilson?

A. 1975.

. . . . .

[701] Q. How many members does the Wilson County people—

A. (Interposing) For progress.

Q. How many members does that have?

A. We have unlimited membership. It is open to any person who has an interest in the affairs of black people

in the city and county of Wilson. It is not restricted to race. However, the organization at the present time is all black and has been in existence now for about four years. I do not hold an office at the present time except to serve on the political action committee.

. . . . .

[702] Q. What is the level of social integration in Wilson County?

A. I would say it is practically non-existent. There are exceptions. But essentially there is no social integration of clubs and other organizations that exist in the community.

Q. Are churches in Wilson County integrated?

A. No. I know one person who belongs to an all-white church. But except for that one exception, the churches are segregated, as well as many other phases of community life.

Q. Are there country clubs in Wilson County?

A. There are: yes.

Q. What is their level of integration?

A. To my knowledge, there are no black members of any of the country clubs in Wilson.

[703] Q. Can you describe the residential—the racial segregation or integration of residences in Wilson County?

A. We primarily have two communities, one black and one white. In recent years, there has been some tendency to integrate some of the formerly segregated communities. But to put it on the map and to look at it, there are two distinct communities, one black and one white, divided by a railroad track.

. . . . .

[704] Q. Have you been involved in any efforts to get black citizens to register to vote?

A. I have. I have been very active in the voter registration arena and have been for some time.

Q. How early did you begin those efforts?

A. I would say around 1968, when a group of us walked from Raleigh to Wilson in an effort to stimulate voter registration—not only in Wilson, but in eastern North Carolina. That was my first major involvement in voter registration.

Q. How were you allowed to register in 1968 in Wilson County?

A. In 1968 and up until recently, I might say, the philosophy of the Wilson County Board of Elections was not to allow voter registration outside of the courthouse—the county courthouse. We tried on many occasions to persuade the County Board of Elections to decentralize the voter registration process and to allow registration on weekends and after hours and by deputy registrars.

[705] And we were met with resistance for years and years. And we were told that the officials did not believe in registration outside of the courthouse. They felt as though that if black people were unwilling to make the sacrifice and come to the courthouse for 15 minutes in order to register, then the board of elections should not make that process more available.

Q. Now, what particular problems for black people did courthouse registration present?

A. I know of three problems. There may be others. But I know of three directly. One is that many black people work 9:00 to 5:00—8:00 to 5:00—and are unable to get off to come to the courthouse for the purpose of registration. That would be one reason.

A second reason is the matter of transportation. We have a very large county. And Stantonsburg, for example, is about 20 minutes from the courthouse. And transportation is a problem. Many people do not have cars and do not have access to other means of transportation. And so it becomes a very difficult task to get to the courthouse.

The third reason, which I think is as important as any of the others that have been stated, is that many people—black people, particularly elderly black people—are afraid of the courthouse. That may sound [706] absurd. But in dealing with illiterate, elderly black people, we find this awful fear of the courthouse because, you know—some of the reasons that I have heard, they say that they remember all white juries. They remember when black people had to sit on one side of the courtroom. And white people had to sit on the other side of the courtroom.

The sheriff is white—always has been—the clerk of court, register of deeds, tax collector, tax supervisor. And so there is an equation made by elderly black—and I see this more in elderly than I do younger blacks—that there is something to fear about the courthouse. And so many people for that one reason do not make the trip to the courthouse.

Judge Phillips: Are you describing a present situation or are you responding to the situation as it existed at the time you describe of courthouse registration only?

The Witness: No, sir. Some of that exists today. But I did say that it is more prevalent among 55 year olds and older, I would say.

By Ms. Winner:

Q. When was voter registration first allowed outside of the courthouse?

A. Several years ago—I would say in the late [707] seventies—the general assembly made it possible for registrars of the various precincts to be authorized to register persons



to vote. And so our focus then became to get some black registrars in the various precincts who could register people to vote. And so the first effort was, I would say, 1978.

Q. What were the results of your effort to get black registrars?

A. We were able to get two or three black registrars—one in an all-black precinct and two others in 50-50 type precincts. But those registrars at that time were restricted to registration within their precinct. And so they could not cross the precinct boundaries.

Q. What problem did that present?

A. That meant that the registration by these officials had to be concentrated in their home community. And they could not go to large gatherings, such as churches and picnics and other places where people from all over came.

Q. Did you or other members of the black community try to expand the registration opportunities of precinct registrars?

A. Yes. We approached the board of elections and asked that the restriction be dropped so that registrars [708] and judges could travel throughout the county without restrictions. And we were opposed, because the officials felt as though the registration should only take place in the registrar's precinct and should not be elsewhere.

And that was the steadfast philosophy of the county board of elections—that they would not make registration any more convenient than they had to by law. And that continued up until the citizen awareness year came about from the state board of elections. That is when it began to change.

Q. What year was that?

A. 1982—last year.

Q. All right. Now, are there any special registrars in Wilson County?

A. The 1981 general assembly mandated that each county with 15 or more precincts would have at least two registrars, two deputy—well, special registration commissioners—one Democrat and one Republican.

And that is what was appointed—one Democrat and one Republican—even though the black community had requested that numerous special registration commissioners be appointed. They only did what the law required them to do.

Q. Now, after the precinct registrars were allowed to register people outside of their precincts, have [709] there been some further efforts to register voters in Wilson County?

A. In 1982 the Wilson County People for Progress embarked upon a massive voter registration drive. It was, I suggest, in response to the candidacy of Mr. Michaux, who was running for Congress. And the organization was very successful in registering, some say, 2,000 black people within a six-week span of time just prior to the 1982 primary.

Q. What was the response of the board of elections to that registration effort?

A. Well, there was no response while it was in progress. But two days after the election, the board of elections at the canvass—after each election there is a canvass, two days after the election. At the canvass meeting of the board of elections, the board of elections changed the policy and the procedures for massive registration.

And the new procedures to be followed in the future after that meeting were to be as follows. There had to be a six-day notice before there was any mass registration. The notice had to contain the date, the time, the place and who



was to be present for the mass registration. It also reduced the compensation that registrars and judges and special registration [710] commissioners were to receive from 50 cents per voter to 25 cents per voter.

And these new rules were promulgated two days after the Michaux election and were placed into effect. I might say, for fairness, they were not enforced because a complaint was made to the Justice Department by the black community. And the Justice Department said to the board of elections that these changes were subject to pre-clearance. And so they have not been enforced.

Q. Have they been submitted?

A. No. They have not been submitted. Now, in preparing the budget for '83-84, the compensation aspect of compensating the registrars has been completely eliminated now. So registrars in the next fiscal year will receive no compensation whatsoever for registering persons to vote, whereas before it was 50 cents.

Q. What are the current barriers to registration of black people that you perceive in Wilson County?

A. There are no legal barriers existing in our community. Registration now is easier than it ever has been in our county. There are some psychological barriers to voter registration which still persist.

Q. What are those psychological barriers?

A. One psychological barrier is that there is a belief on the part of many people that politics will— [711] one's participation in politics will make no difference in their individual lives and in the lives of their families. And so it is a complete waste of time to get involved in the political process.

That is a perception that is ill-founded. But many people believe that it will make no difference if they get involved. That is one.

The second thing is that, as I alluded to earlier, the problem of the courthouse barrier. Many people simply don't want to go to the courthouse. In my precinct, precinct 3, not only is the board of elections housed in the courthouse, but we vote in the courthouse. That is the polling place for that precinct.

And it is a large black precinct. And it is in the heart of the black community—not the courthouse. But the people who vote reside in a very compact area. And many people have told me, "I don't want to go to the courthouse. I am 70 years old. I have never been to the courthouse before. And I am not going now." And that is a barrier.

Another barrier is that most all the polling places are located in white communities. And so the black person has to travel long distances to get to the polling place. And in our city—you would have to see the precinct map to really understand it. But we have [712] what we call two-mile islands. You know, we have precincts that are two miles long and two blocks in width. And so it is like a cane. And so the furthest points in some of the precincts are two miles apart, which means that the person has to travel perhaps a mile to get to the polling place. And that is a barrier.

Q. Do those precincts extend into the black community and into the white community?

A. Yes. As I testified earlier, the railroad track divides the two communities. And the precinct boundaries, which were created back in the forties, I guess, run from east to west in the opposite direction than the railroad track. And so they extend throughout the city in a very narrow strip.

And it has the effect of requiring persons who reside in those precincts to travel long distances to vote. And there is no commonality in those precincts. There is a very poor

black area in the precinct and a very wealthy element in the white community.

Q. In your opinion, what would help encourage black voter registration in Wilson County?

A. One thing that would help improve is if we could see the presence of black office holders. That would be a stimulus in creating the desire on the part of black people to get registered to vote, if they could [713] see persons who can be successful in the electoral process.

Q. What is the extent of election of black people in Wilson County?

A. There have been a few. They have been very limited. We have one black elected to the board of education who was elected in 1970 and was re-elected in 1982. And that sounds odd. But there was a reorganization in the process. And he did not have to run again until 1982.

Q. How many members are on the Wilson County Board of Education?

A. Nine.

Q. What is the black population in Wilson County?

A. 36½ percent.

Q. Are there any other black elected officials in Wilson County?

A. We have one black on the city council.

Q. Out of how many members?

A. Out of six councilmembers—one out of six.

Q. What is the black population of the city of Wilson?

A. 40.27 percent.

Q. Are there any other black elected officials in Wilson County?

[714] A. No. We have never had a black elected in the history of the county to the board of commissioners. We have tried and have failed. We have never had a sheriff or any of the other elected positions, except the city council and the board of education.

Q. Have you been involved in any efforts to recruit black candidates?

A. Every election we attempt to recruit black candidates to run for public office. And we have a tremendous amount of difficulty in doing this, because the more qualified—and I use those words very carefully. But the more qualified black candidates who would be acceptable to the black community do not want to run.

And the stated reason is that, "I can't win. Why should I run if I can't win?" That is always the response that we get. And so it is very difficult to encourage people to run for public office.

Q. Are you familiar with the current house of representatives district which contains Wilson County?

A. Yes. We reside in the 8th district.

Q. What else is in that district?

A. Wilson, Nash and Edgecombe counties.

Q. Do you know whether there has ever been a black representative from that district?

A. There has never been, to my knowledge.

. . . . .

[715] By Ms. Winner:

Q. Are you aware of the—do you think that there is a system or a method of electing the representatives from that district which would be better for the black community?



A. Yes.

[716] Q. What is that method?

A. I have looked at the 8th district very carefully. And I have looked at it for some time, even before it became known as the 8th district. It was the 7th district, all comprised of the same three counties.

And I have tried to figure out whether or not black candidates for the state house could be successful in this three-county area. And while I am not prepared to say that absolutely no black could ever be elected in this four-member district, I am willing to say that it would almost take a minor miracle for it to happen.

It would have to take a combination of certain variables falling in place. One variable would have to be a low white turnout; a high black turnout; a solid, single-shot vote by the black community; and a very attractive black candidate to the white community; and the presence of eight or ten or maybe twelve persons running for four seats.

If all of those variables fell in place, it is my opinion that a black candidate would be able to, not win the election, but at least to place sufficient to be in a runoff. What would happen in the runoff, I don't know. But I don't believe a black person could get a clear majority, even assuming those variables to be in place, in a primary.

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[737] (Whereupon,

**Fred Belfield, Jr.**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 2:02 P.M.

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By Ms. Winner:

[738] Q. Are you currently a member of any organizations?

A. Well, I am a member of the NAACP, Y Men's Club. Those are the two civic groups I am a member of.

Q. Have you held any positions in the NAACP?

A. Yes; I have.

Q. What position is that?

A. Well, I have held the position of president for ten years.

Q. What branch is that?

A. That is the Rocky Mount branch of the NAACP.

Q. What years were you president?

A. I was president from '68 to '76 and then again from '78 to '80.

• • • • •

[745] Q. What are the current barriers to getting black people to register in Edgecombe County and in Rocky Mount?

A. Well, transportation. Another barrier would be fear.

Q. Fear of what?

A. Well, fear of the process. Obviously, people who have never registered, based on conversations with some of them and especially the older people—I would say people above 50 who have been around and who can remember back in the forties and fifties how difficult it was to register to vote—still aren't sure that when they go down to register, even though you tell them that you don't have to worry about reading the constitution or a portion of the constitution or the literacy test—they are not sure that you are telling the truth; that I may have to do more than just sign the voter registration card after I have been asked the proper information.



Another barrier is when you don't get full cooperation out of the registrars.

Q. What do you mean by that?

A. Well, registrars can be out of place. For example, if you are trying to register people when you don't have a specific, designated day, you may or may not find them. And that could be a barrier.

[748] And another one is—well, I believe I said it. But I will say it again—lack of cooperation.

Q. Lack of cooperation from whom?

A. The registrar.

Q. What is it that they do that is not cooperative?

A. Not making themselves available; or—well, here is another one that you get sometime: "I am out of cards. I have to wait until the executive of the board of elections sends me some more cards."

Q. Is there anyplace in Edgecombe County other than the city hall—any public place in Edgecombe County other than the city hall and the board of elections—that you can regularly register?

A. Public places?

Q. Yes, sir.

A. Not that I know of. We do have floating registrars that they allow to—I am not sure of that total number. But I know in my precinct, which is probably the largest one in Edgecombe County, we do have two floating registrars allowed to float anywhere in that precinct wherever people are concentrated.

If there is an activity going on, they can go to this and register people. But county widespread—I am not sure that they do that. In fact, I would be [749] inclined to be-

lieve that they don't allow it, because complaints were filed in 1982 with the justice department in connection with lack of cooperation.

[750] Q. Are you familiar with how the media dealt with that election?

A. Well, every time I picked up the paper and read anything coming from the news media, it always emphasized Michaux as the black candidate who is seeking to become the first black elected congressman from North Carolina since reconstruction.

Q. Was that limited to the newspapers?

A. Well, all news media—radio and TV.

Q. How does the media in those two counties treat white candidates?

Well, they just list them as a candidate. They don't emphasize race.

[753] Q. Do you think it is important for black people to have black representatives?

A. I think so.

Q. Why?

A. For a number of reasons. Number one, I think it is a good role model for our young people growing up. It gives them some incentive to want to participate and get involved in local government, state government and national government.

Another reason is I think that the black views need to be heard on all levels about all the issues involved. For example, I can think of the ERA issue. Blacks were never

consulted, to my knowledge—those that I have asked; nor have I ever been consulted by any politician as to what are your views on that. That is an emotional issue. We were just bypassed.

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Q. Do you think that white elected officials can represent the black community?

[754] A. It is possible for some that are willing to closely align themselves with the black community. But most politicians tend to shy away from that because they don't want to be branded as a black lover, which another candidate with a more conservative view can use that to defeat him.

• • • • •

[763] I see. But whenever in eastern North Carolina the people have a choice about these matters, they usually are still lined up along racial lines; aren't they—in club memberships and things?

A. Mostly. We organized a new 4-H club in Nash County this year that is integrated out there in the community. But it is a small—it is a slow process.

Q. It is very gradual; isn't it—the process of integrating all of these activities?

A. Very slow; yeah.

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[765] (Whereupon,

**Joe P. Moody**

was called as a witness, duly sworn, and testified as follows:)

# DIRECT EXAMINATION 2:45 P.M.

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By Ms. Guinier:

[773] Q. Have you conducted any registration drives [774] or attempted to register any people who work as tenant farmers?

A. Yes; I have.

Q. Have you had any problems registering those people?

A. Some people live back on the farm and been farming all their life—not their farm, but they work for some white people. And they are skeptical about getting off and trying to register because they are scared that the man might get mad with them or might make them move or whatever—she or he.

• • • • •

[781] A. No; he didn't.

Q. What is the racial composition of the six-member county commission in Halifax?

A. All six of them are all white.

Q. Has a black person ever been elected to the county commission in Halifax County?

A. No; they have not.

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[787] (Whereupon,

**Theodore Arrington**

was called as a witness, duly sworn, and testified as follows:)

# DIRECT EXAMINATION 3:30 P.M.

By Mr. Hunter:

[789] By Mr. Hunter:

Q. Dr. Arrington, what studies have you done of campaign costs and contributions in Mecklenburg County?

A. I studied all of the official campaign reports of all the candidates for local office except for state senator from 1975 through 1980. And I also studied in depth all of the contributors to all of the candidates in 1978 and 1979.

Q. What elections would these be composed of? Would you explain that for the court, please?

[790] A. These would be composed of the North Carolina House; Charlotte city council, both at large and district; county commission; and such single-member executive offices as sheriff; and the school board.

Q. Of the Charlotte city council elections that you studied—do they have both multi-member and single-member districts in Mecklenburg County?

A. Yes.

Q. When I say "single-member districts," are these districts in which the candidates are nominated and elected from one district?

A. Yes.

Q. What data did you glean from these campaign costs and contribution lists? How did you organize the data?

A. In organizing the data, what we did was look at the official campaign reports and record the name, address, party registration, sex, race of each contributor to each candidate during that time. And then we merged those files with the information on the candidates—how much they spent, whether they had run before for public office, and so forth. And when we merged those two, then we had an accurate picture of who gave how much to which candidates.

Q. Is this methodology that you used in comparing [791] this data standardly recognized in the political science academic community?

A. Yes.

Q. Did you conduct this study for purposes of this lawsuit?

A. No. I received a grant from the foundation of the University of North Carolina at Charlotte to do this study for academic purposes.

Q. After comparing this data, what conclusions did you reach after you completed your study?

A. I reached four basic conclusions. First of all, at large election campaigns cost candidates more than twice as much as do single-member district elections. Secondly, I found that giving to candidates tends to follow racial lines. That is, blacks tend to contribute to black candidates. And whites tend to contribute to white candidates.

We discovered that only 2 percent of the money that white candidates received had come from black contributors; whereas, we discovered that about 30 percent of the money received by black candidates came from white contributors. Third—

[793] By Mr. Hunter:

Q. Dr. Arrington, is your first conclusion—that that the cost of running in a multi-member district being greater than twice the cost of running in a single-member district—true for black candidates as well as for white candidates?

A. Yes.

Q. Is it also true that the cost of running in a multi-member district is more than twice the cost of running in a



single-member district—true for winners as well as losing candidates?

A. Yes.

Q. What conclusion did you reach in regard to [794] the contributions that whites may make to black campaigns?

A. When whites contributed to black candidates, they gave less than when they contributed to white candidates.

Q. Did black contributors contribute on the average as much money to black candidates as white contributors contributed to white candidates?

A. No.

[800] Q. How does the use of multi-member districts impede the election of blacks in North Carolina in these elections?

A. It impedes them first of all because the black population is substantially submerged in the larger, mostly white multi-member districts; and secondly, because multi-member districts require more money to [801] campaign. And blacks tend to have less money to spend on such campaigns.

Q. When the political science literature examines the relationship between the socioeconomic status of citizens and participation in the election process, what do their examinations find?

A. The literature consistently shows that persons who have low socioeconomic status tend to participate in politics less than those who have high socioeconomic status.

Q. Does this finding in the political science literature in your experience and education apply to North Carolina elections in these multi-member districts?

A. Yes. It is one of the factors which help to explain why blacks participate less—for example, vote less—than do whites.

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[829] (Whereupon,

**Frank Winston Ballance, Jr.**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 9:05 A.M.

By Ms. Guinier:

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[830] Q. Have you been involved in politics?

A. Yes; I have,

Q. Could you describe what your present position is.

A. I am presently a representative from the 7th House district to the North Carolina general assembly, having been elected in 1982, I guess.

• • • • •

[831] Q. What political organizations are you a member of?

A. I am a member—vice-president of the Warren County political action council. I am chairman of the second congressional district black caucus.

Q. What is the Warren County political action committee?

[832] A. The Warren County political action council is an organization which involves itself in the political aspects of Warren County in terms of voter registration, supporting candidates for office, involving issues of political and non-political affecting the Warren County commission.

It is an unorganized—unincorporated is what I meant to say—organization—informal organization.

Q. What is the racial composition of its membership?

A. As far as I know, it is all black. There may be some Indians who are members.

[833] Q. You testified that you are elected from a majority black district. Is that a single House seat or a multi-member district?

A. That is a single House district seat.

Q. Was that a single House district seat in 1980?

A. No; it was not. I believe we were part of the—what is known as the 22nd district. I don't recall what number it was at that time. But it is the same district that primarily now is comprised of the 22nd House district, Vance, Warren, Person, Granville.

Q. Did you ever consider running for the 22nd House district when Warren County was part of it?

[834] A. I considered it, but not seriously.

Q. Why is that?

A. I couldn't get elected.

Q. Why is that?

A. Well, the history is that in the multi-member districts it is difficult for blacks to be elected, particularly in the district that I reside in. I know Mr. Clayton ran at least three times. The district was about 40 percent black, as I recall. He never got elected.

Floyd McKissick, Jr. ran one time, maybe twice. He did not get elected. And others have run for the same seat—for a seat in that district. And the history is that those

candidates have received tremendous support from the black communities in the district in the various counties, but they received very little support from the white communities in those districts. As a result, they were not able to be elected.

I therefore concluded that it would not be profitable or wise for me to run for that office because I would be wasting my time and efforts in terms of not being able to get elected.

[838] Q. Where did you campaign in terms of the white community?

[839] So that was basically my campaign in the white community because I felt that going into the residential areas would not be feasible. It was not traditional, and I did not do it. I did campaign in the black community and of course in the black churches.

Q. Did you campaign at any white churches?

A. No.

Q. Were you invited to any predominantly white civic clubs?

A. None. I was a bit surprised. I am fairly well known in Warrenton, and I have been there for—since 1966. It is a small town. I know many of the people, but I did not get invited to a single what I would call a civic club in the white community.

[840] Q. What about in Warren County?

A. Warren County—the black population was 59.9 percent black. It is about 5 percent Indian.

Q. Are you familiar with the housing patterns in those counties?

A. Yes.

Q. Would you describe those, please?

A. Generally speaking, in the area housing patterns—you can demonstrate that blacks live in certain areas and whites live in certain areas. And this is true even in the rural areas to a degree. For example, you have certain precincts that are predominantly black—heavily black. You have others that are predominantly white.

In the rural areas you do have, of course, as

[841] There are distinct housing patterns in the area—black and white communities.

Q. What is the level of social attraction between the races?

A. It is very limited. There is some, but it is not very much. On the social level you don't have very much social racial intermingling.

Q. Would you describe, please, the level of municipal services in the black community compared to the white communities?

A. There is again a distinct pattern of what I would call discrimination, or it might better be described I guess as a lower level of services in the black community than you find in the white community.

[842] In the general area that I am talking about, you find that in the cities you can tell when you leave the white community and go to the black community by the quality of the streets, the street lights. Even we found in several situations you have less fire hydrants and you have smaller water lines in the black community. For example, you might have a two-inch line in the black community and a six-inch line in the white community.

I think these patterns have persisted over a long period of time and still persists. There is some effort to correct that through lawsuits and through voluntary efforts to have these patterns changed. There is some change coming, but it is still distinctive.

[846] Q. How would you describe the voting patterns of people throughout these counties?

A. Well, if I understand your question, what you have is this: When a black candidate runs for office, if he is a good candidate—and we like good candidates too—then you can count on getting the black vote. But you cannot count on getting support in the white community.

And that has been true in race after race for [847] office after office.

On the other hand, when white candidates run, again if they are good candidates, they can count on getting the white vote and the black vote. And we don't have the kind of reciprocity that we ought to have in my opinion. I don't know. I think whites for some reason, whatever, feel that they do not want—yet they refuse to—numbers. And I don't mean that is absolute; of course, it is not. But they do not vote to elect black candidates as a general principle. They vote against them. It doesn't make any difference how qualified they are.

Q. How do these voting patterns affect participation by black voters?

Because many people have been told—black people—that your vote doesn't make any difference anyway. A lot of them want to believe that; a lot of them believe that.

When you convince those folk that their vote does mean something, that they can go out and elect people of their



choice and they go out and you get them excited [848] about the campaign and get them to participate and get them to come out and vote, you have a result which their candidate which everybody was enthused about is defeated—and this happens time and again—then you have very—have a very difficult time convincing those folk to come back again.

What happens is that it convinces them that their vote doesn't make a difference; that it won't be any different whether they go out and vote or not. And so as a result of that, it makes it more difficult for candidates to get support.

Q. Do black voters or black people participate in the political process at the same level as whites?

A. No. In addition to what I have just said—and that is one of the things that is just the end result. You know, blacks—well, you have to go all the way back, I guess, to when we could not participate. And then you come up and you have some of the artificial barriers removed, but it is very difficult to remove some of the psychological barriers. And a lot of those barriers are still there, such as the feeling that "I work for Mr. Jones who is white, who owns the farm, and he really doesn't think that I ought to be participating in voting and registration. And he is the one who pays my salary." You know, this is the kind of thought process that many blacks go through. And [849] they are not willing in many instances—this is a psychological barrier, I would say. Many times it is a real barrier, because many of those folk that they work for don't want them to participate, and they will make it be known.

For example, in Warren County, on primary day normally that is a day of setting tobacco from early in the morning until late at night. And you know, the particular farmer will make sure that everybody he has influence with is in the tobacco field. And of course, the farmer himself—the white farmer—can take off in his truck and go down and vote. But the people that are working for him are left in the

field. And that happens more than you might think. And this might affect 10 or 12 voters on one particular place on that particular day.

So you have the psychological barriers as I was talking about. You also have the actual barrier of the people being prevented in many instances from participating. And of course, there is a carryover also. I think there is still some fear in black voters in the area I am talking about. Whether it is justified or not—it may well be justified, because I think the Klan—and if you go back in history far enough, the red shirts, may be the people who put the initial fear on blacks—that you don't participate.

Well, the Klan is still alive in North Carolina [850] as you well know. I don't know if the record shows it, but in the Greensboro situation where people were killed by the Klan or the Statesville situation where recently a cross was burned in the home of a minister—in the yard of a minister—and that comes out in the state press and I guess in the national press. People are aware that some of these situations still exist.

And of course, when you have this kind of intimidation, you do have an effect on the willingness of people to go out and get involved in politics.

Now, obviously that is not the same extent that it used to be. But there is still some lingering effects from that.

Q. Do you in your opinion—do blacks have an equal opportunity to elect representatives of their choice in districts where whites are a majority of the voters?

A. No. I think for the same reasons I have given you. In addition, I think there are probably some blacks that probably can get elected—and the record shows that some have been elected—in multi-member districts. But the answer to your question is no. Blacks do not have the same opportunity to elect people of their choice in multi-member districts.

Q. In the legislature have you worked with any blacks who have been elected from multi-member districts in [851] which blacks were a minority of the total electorate?

A. Yes. We have several in the general assembly.

Q. Could you describe your experience working with some of those black legislators?

A. Yeah. I would say first of all that they are good people. But I guess they are like other people who get elected. And the problem is see is this: There is a degree of intimidation on these blacks who are elected from the multi-member districts. It goes like this: A white who is elected in the multi-member district can take a stand that is directly contrary to the minority black vote in that district and get reelected.

A black cannot take a stand that is directly contrary to the majority white and feel that he can get reelected. And when I say "take a stand," I am talking about an issue that may be a racial issue, for example. And you have a black who is elected in a multi-member district—he does not feel the same freedom to take a stand on that issue knowing that when he goes back for reelection he has got to go down in the white community and stand for reelection, and the whites can throw him out of office, whether his stand was justified or not.

And that has an effect in my opinion and in my experience on blacks who are elected in multi-member districts.

[852] Q. Could you give us an example?

A. Well, I do recall that during the time that we served this year that one or two issues came up, and being from a single-member district I was asked to take the lead on the issue. I think that may have been the reason for it.

Q. You were asked to take the lead by whom?

A. We have a black caucus in the general assembly—all the black members of the general assembly. And of course, the discussions were on that caucus meeting—there were several of us. And I think the reason was that probably the fact that I was elected from a single-member district, I was asked to take the lead.

Q. In your opinion, or should say in your experience, have blacks who are not in your district come to you as a representative in the House with their problems?

A. Yes, on more than one occasion. And I welcome them, some of whom knew me and some did not, but who knew that I had been elected from Warren County. And when they came to me—I am not sure for what reason—but they felt that—at least during my discussions I found they felt I would be responsive to the issues that they had at hand.

And in some case I was able to be of help and some I was not. But I made an effort to. I feel like—well, I guess sometimes people read about what you say or what you do or hear about it and they feel like this is a [353] person that I can go to. I recall when I was younger—I guess I was not old enough to vote at that time. But I did have a congressman. But the way I perceived it in my mind—my congressman was from New York. His name was Adam Powell. He spoke on the issues the way that I felt.

• • • • •

By Ms. Guinier:

Q. Directing your attention to that map, do you believe that blacks in that district have an equal opportunity to elect a representative of their choice?

A. That is in the district as it now exists?

Q. That is right.

[854] A. No. That is Monk Harrington's district. He is from Bertie County. The district is less than 50 percent



black as it now exists. And a black cannot be elected in my opinion in that district running against Mr. Harrington or running against anyone else who is a good white candidate.

Q. And when you say the district is less than 50 percent black, are you referring to the voters or population?

A. Voting age population, as I recall. I believe it is 55 percent black overall populationwise.

Q. Do you have an opinion as to why some people do not want to enlarge that district?

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The witness: I know why Monk Harrington would not want to enlarge it, because if the district were enlarged to be a majority black population district, he might not be reelected. I think the same thing would apply to some white citizens who live in that district who may not want to have a black representative.

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[855] CROSS-EXAMINATION 9:49 A.M.

By Mr. Leonard:

Q. Did the Warren County political action council endorse a candidate for clerk of superior court in the last election?

A. Quite possibly so. If I recall correctly, it was Richard Hunter or we didn't endorse anybody. I don't recall.

Q. Isn't it correct that Richard Hunter, the white incumbent, ran against a black person in that election?

A. Well, yeah.

Q. What was wrong with the black person that the council didn't want to endorse him?

A. Let me answer your first question. I think it is correct that Mr. Hunter ran against, again, Mr. Byrd, I believe who was the black candidate who ran.

Q. What was there about the black person that caused your council to reject that black and support Mr. Hunter?

A. Mr. Byrd was not a good candidate in the [856] collective opinion of the political action council.

• • • • •

[866] Q. Have you been successful in getting any of those white leaders to openly support you?

A. Going back to this last race, I don't believe that anyone came out openly and notoriously supporting me in my race for the state House.

Q. But you had to get some white votes?

A. I did get some votes. When I say "opening and notoriously," for example, there were some whites in Warrenton whom I have known for years and they have known me in my work as a lawyer, and I know that they supported me. But they didn't go out and campaign down the street.

Q. Has anyone, for example, in Northampton County—a white political leader who would feel free in the contemporary setting openly to support a good black candidate in your opinion?

A. I would think yes, there would be some. I think there would be very few. That would be my opinion.

[867] I think you will find, Judge, that there are some whites across the board in the following maybe two categories: Some will come to you privately and say, "Frank, I support you," and will give me a check. I got a couple of contributions. But you do not find very many who are willing to go out and get on the stump. When I say "get on the stump," I mean just go out and say publicly that



"I think Frank Ballenger is a candidate that you should support." Maybe that day is coming, but it hasn't quite come around yet.

Q. It is better than it was?

A. Yes; it is.

Q. Ten years ago?

A. Ten years? A lot better than it was 20 years ago.

Q. But it is still, I take it in your opinion, from your own experience improbable in that region that a good black candidate can gain the open support of a significant influential white political figure?

A. That is true. And of course, if a white political figure is also a candidate, then he is going to be very reluctant to risk his own political—

[925] (Whereupon,

**Leslie Bevacqua**

was called as a witness, duly sworn, and testified as follows:)

#### DIRECT EXAMINATION 11:57 A.M.

By Ms. Heenan:

[926] Q. What is your present job, Ms. Bevacqua?

A. I am the appointments aide for boards and commissions to Governor James B. Hunt, Jr.

[937] Q. Can you tell us by name who is serving on the inmate grievance board?

A. Yes, I can. The black members on the inmate grievance commission are Mr. J. G. Butterfield, Dr. [938] Elizabeth Stovall, and Reverend George Battle.

[1064] (Whereupon,

**Marshall Rauch**

was called as a witness, duly sworn, and testified as follows:)

#### DIRECT EXAMINATION 3:53 P.M.

]1065[ By Mr. Leonard:

Q. Are you currently a member of the general assembly of North Carolina?

A. I am.

Q. What position do you hold?

A. I am presently co-chairman of the finance committee, and I am chairman of the legislative ethics committee.

Q. In which House?

A. In the Senate.

Q. How long have you been a member of the state Senate, Senator Rauch?

A. I have been in the Senate 17 years. This is my 17th year.

Q. During your senatorial service, how many legislative redistrictings have you been involved in?

A. I have been involved in two.

Q. When was the first?

A. I believe the first was in 1971. I was a member of the Senate redistricting committee. In 1981 I was chairman of the Senate redistricting committee.

. . . . .

[1068] Q. How long have you known Ralph Gingles, Sr.?

A. 30 years maybe. Ralph was on the Gaston County good neighbor council with me. That is when we came very close—30 years ago—20 years ago.

Q. Has he ever been in your home?

A. Sure.

Q. Do you know his son?

[1069] A. "Skipper"?

Q. Ralph, Jr.?

A. Yeah. I know his son very well.

Q. And you know that "Skipper" or Ralph, Jr. is one of the named plaintiffs in this action?

A. Yes. That was a surprise to both of us.

Ms. Winner: Well, I object to what was a surprise to Mr. Gingles.

Judge Phillips: Well, we won't consider that answer.

By Mr. Leonard:

Q. How long have you known the Ralph Gingles who is a plaintiff in this action?

A. 25 years or so. When he was real little, I didn't know him. Let's say at least 10 or 15 years.

Q. Now, did there come a time in the 1981 session of the legislature when you became involved in redistricting?

A. I am sorry?

Q. You had a role to play in the redistricting process this last time?

A. Oh, yes.

Q. Tell the court what committee it was and what role you played?

A. Well, the redistricting—the Senate redistricting went to the Senate redistricting committee, and I was [1070] chairman of that committee.

. . . . .

[1075] Q. Now, Senator Rauch, prior to February 9th of 1982, had anyone from the State of North Carolina approached you to urge you to support the concept of single-member districts in the larger metropolitan counties?

A. I don't think so. But there is a possibility that Senator Billy—Senator Bill Mills always wanted, I believe it was, numbered seats. I believe the first time I heard it was February 9th when Senator Frye asked that we vote on a single member district. And then Senator Mills made a motion for a subcommittee to study it.

Q. When did Ralph Gingles, Jr., the plaintiff in this action, first contact you to urge you to support single member districts for the larger metropolitan counties?

A. He never did.

Q. Do you know whether or not Mr. Gingles is a constituent—the plaintiff in this case is a constituent of yours?

[1076] A. Sure, he is.

Q. Do you know where he lives?

A. Sure.

. . . . .

[1079] CROSS-EXAMINATION 4:17 P.M.

By Ms. Guinier:

[1085] Q. And in fact, as a result of the department of justice's objection to the North Carolina constitutional amendment, you were permitted to break county lines wherever that was necessary to get predominantly black districts?

A. Right.

Q. The amendments that prohibited dividing counties were thrown out as far as you were concerned as a result of the department of justice's objection to those amendments?

A. That is correct. We could break the lines.

Q. It was your understanding, Senator, that the legislative redistricting criteria that you referred to [1086] indicated that you could cross county lines?

A. That is correct.

Q. And this legislative criteria was the basis on which you redistricted the Senate?

A. That is correct.

Q. Now, after this lawsuit was filed and the department of justice had objected both to the North Carolina constitutional provision as well as to the first [1087] Senate reapportionment plan, you told the staff to come up with good plans that would enable or enhance the election of minorities; is that correct?

A. Definitely.

Q. And this meant drawing single member districts where a majority of the people within what was previously a multi-member district were black if a single member district were drawn?

That is correct.

Q. And you were not told of any legal reason why this could not be done across the entire state?

A. That is right.

Q. And you were not told, for example, that it could only be done if the plan were gerrymandered?

A. No.

Q. And you were advised by the staff or by the counsel who were retained that they were looking specifically at Mercklenburg County to see if a 65 percent majority black district could be drawn?

A. We talked about that; yes.

[1096] CROSS-EXAMINATION

By Ms. Guinier:

[1097] Q. I am handing you a copy of a deposition that you gave in this case. Could you please turn to page 90 of that deposition? Would you please read aloud starting with line 2 to the top of page 91, line 2?

A. Okay. "... Did you have any advice on the issue of whether or not to take Mecklenburg county as a covered county and treat it and give it a separate district?"

"... I don't think we were told to do that."

"... You were not told to do that?"



"... I don't think it was suggested."

"... But these are your decisions, aren't they? These aren't legal decisions."

"... We could have done it."

"... Right. But you neglected to do it?"

"... We chose not to do it."

[1098] "... So you made an affirmative decision not to do it?"

"... Yes."

"... What was the basis upon which that affirmative decision not to do it was made?"

"... It wasn't necessary."

"... It wasn't necessary to comply with the section 5 requirement?"

"... That is correct."

"... Was any discussion given to other sections of the voting rights or the fifteenth amendment at that time?"

"... No; but we were aware of the mandate."

"... You were aware of the submergence question?"

"... Yes."

• • • • •

[1121] Q. Now haven't you said that the primary reason that legislators are concerned about not breaking county line was because that's how their old districts were drawn and that's how they get elected?

A. Yes, that's one of the main reasons.

• • • • •

[1158] Whereupon,

**Louise S. Brennan**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 10:59 A.M.

By Mr. Leonard:

• • • • •

[1159] Q. Are you a member of the North Carolina House?

A. Yes, I am.

Q. North Carolina House of Representatives?

A. Yes.

Q. What's your educational background?

A. I have a B. A. in English and political science, and an M. A. in political science.

Q. And what district to you represent in the House of Representatives?

A. 36th district.

Q. And that's Mecklenburg county?

A. Yes.

• • • • •

[1178] A. I believe that in campaigns that I've participated in in the past 20 years, both black and white communities open up their communities to candidates of the other race. And I have seen nothing to the contrary.

Q. And have you, during the course of those years, supported black candidates?

A. Yes, I have.

Q. Just name a few for the court.

A. Harvey Gantt, Arnie Shuford, Jim Pope, Bob Walton.

Q. Have you contributed money to their campaigns?

A. To at least 3 of those 4.

Q. Have you helped and assisted them in their campaign activities?

A. Yes. Yes, I have.

Q. Tell the court just briefly, Ms. Brennan, what your experience is with respect to the ability of black people to register and have access to the political process in the county—and please, briefly.

A. Briefly, during the past 20 years, I have participated in helping to open up the process for blacks and everyone else beginning in 1963 and '64 prior to the Voting Rights Act. We put on a substantial registration drive with the help of Dr. Hawkins, who had a foundation grant to do that.

I have consistently, in all my Democratic Party [1179] involvement, supported wide open registration and participation in the political process and continue to do so.

. . . . .

[1189] Q. Now at the February 6 meeting which took place after the public hearing, Jim Richardson was present, is that correct?

A. That's correct.

Q. And Phil Berry was present?

A. Uh-huh.

Q. Harvey Gantt was present?

A. Yes.

Q. And Sara Stephenson was present?

A. Yes.

Q. And Raleigh Bynum was present?

A. Yes.

Q. And Arthur Griffin was present?

A. Yes.

Q. And there were a number of black leaders present at that meeting?

A. Yes.

Q. Almost to a person, the black people at that meeting spoke out in favor of single member districts, did they not?

. . . . .

[1190] Q. Do you remember my question?

A. Yes, I do. And I will say several people present didn't say anything. Several people did express support for single member districts. And at least one expressed support for the current at large district.

Q. And who was that one person?

A. Malachi Green.

Q. And is Malachi Green the only person you can recall who spoke out in favor of the districting system as it presently existed?

A. I believe at that meeting he's the only one.

Q. Now the other people who spoke out in favor of single member districts specifically told you that they did not like the multi-member district scheme for Mecklenburg county, is that correct?

A. Well, I'm not sure they told me they didn't like that, but they said they would rather have single member districts.

• • • • •

[1191] And they told you that one of the reasons that they were in favor of single member districts in Mecklenburg county is that in order to elect a candidate of their choice the way the system presently exists, blacks have to concentrate their votes?

A. I doubt that concentration or single-shooting was ever mentioned in that particular meeting.

Q. You don't recall that a number of the people complained that blacks have to single-shoot in order to elect a black candidate?

A. I don't believe that that was ever mentioned.

Q. Were you present when Phyllis Lynch testified last week in this courtroom?

A. Yes, I was.

Q. Were you present when she said that blacks have to single-shoot in order to elect a candidate of their choice?

A. Yes, I was present when she said that.

Q. And you were present when Phyllis Lynch testified that the reason blacks have to single-shoot especially in the primaries is because there are some white people who are reluctant to vote for a black candidate?

A. I was present when she testified to that.

Q. After Ms. Lynch testified, did you talk to her?

A. Yes, I did.

[1192] Q. When she came off the stand?

A. Yes, I did.

Q. And didn't you tell her that you would be doing the same thing if you were her?

A. I said if my goals were hers.

Q. Now in February of 1982, at the meeting that you had at the Charlotte Youth Council?

A. Yes.

Q. You told the black people who were speaking on behalf of single member districts that you were opposed to changing the present plan, is that correct?

A. Yes.

Q. And you told them that the Justice Department has been working with the legislature and that the legislature's plan would probably be approved, is that correct?

A. Yes.

Q. And you told them that it was all over but the shouting, is that correct? Words to that effect?

A. Yes, I did, probably. I don't really recall saying that, but if they say I did, I probably did.

Q. And you spoke very frankly?

A. I always do.

Q. And you told them, and I'm paraphrasing again, "We Democrats are not going to let Republicans get into the legislature."

[1193] A. No, well, paraphrasing, I would never have said it that way. It's quite likely that I said I would not willingly relinquish seats to Republicans.

Q. And you said, and I'm paraphrasing again, that single member districts would open the doors to Republicans?

A. Well, it depends on how the districts are drawn. I doubt that I said that, you know. But it would certainly depend on how the districts were drawn.



Ms. Guinier: May I have a moment, please?

(Pause.)

By Ms. Guinie :

Q. Now at the time of this meeting, one of the primary concerns of the black people who were assembled was they had been unable to elect a black person to the house of representatives from Mecklenburg county, is that correct?

A. I think that was their concern, but I'm not sure that it is well placed.

Q. My question was that was one of the concerns they expressed to you?

A. Yes.

Q. And again, paraphrasing, didn't you tell them, "We are going to get you a black candidate this time"?

A. Oh, no. I certainly would never have said that. [1194] We had 2 black candidates present who I knew would be candidates. Phil Berry announced to me that date that he was going to be a candidate and Jim Richardson was already an announced candidate, at least to his personal friends. So I know that 2 candidates were running, so I never would have said that.

Q. Did you say, again paraphrasing, that we're going to get a black person elected this time?

A. I thought we would get 2 elected this time—this past time.

Q. Did you say something to that effect?

A. Yes, I probably did.

Q. Who was that candidate?

A. Jim Ross.

Q. And when did he run?

A. He ran in 1970 with me, although I lost in the [1195] primary. He lost in the general election that year because it was in the middle of the busing controversy.

Q. In your opinion, was he a qualified candidate?

A. Yes, he was.

Q. Now you also described on direct examination your experience with Dr. Bertha Maxwell who ran for the house in 1980. And she was defeated in the general election?

A. Yes.

Q. In your opinion, is she a qualified candidate?

A. Yes, she was.

Q. You've also mentioned Jim Richardson. And the fact that you were familiar with his run for the North Carolina house. He won the primary, did he not?

A. Yes, he did.

Q. And he lost the general election, is that correct?

A. Yes.

Q. And that was in 1982?

A. Yes.

Q. In your opinion, was he a qualified candidate?

A. Highly qualified.

Q. You state you were also familiar with James Polk who ran for the senate. He ran from Mecklenburg county, is that correct.

A. Yes.

Q. And he was nominated in the primary, is that [1196] correct?

A. Uh-huh.

Q. And he lost the general election?

A. Yes, he did.

Q. In your opinion, was he a qualified candidate?

A. He was.

Q. Jim Black is a member of the delegation as it presently exists from Mecklenburg county, is that correct?

A. Yes.

Q. And Jim Black was first elected in 1980, is that correct?

A. Uh-huh.

Q. And when Bertha Maxwell ran in 1980, Jim Black also ran for the house from Mecklenburg county in the general election?

A. Yes.

Q. And this was the first time that Jim Black had run for public office, is that correct?

A. Yes, it was.

Q. And Jim Black was elected?

A. Yes, he was.

Q. And Jim Black is white?

A. Yes, he is.

• • • • •  
[1211] CROSS-EXAMINATION 12:10 P.M.

By Ms. Guinier:

• • • • •

[1216] Q. And in fact, you believed—or, in fact, you testified that the school system in Wake county was integrated only as a result of litigation.

A. That is correct, yes.

Q. And you testified that neighborhoods in Wake county are identifiable by race?

A. They are, certainly.

Q. And that churches in Wake county are segregated by race?

A. Absolutely.

Q. And that social clubs in Wake county are racially identifiable?

A. As far as I know, they certainly are.

Q. And that the black community in Raleigh tends to be poorer than the white community in Raleigh?

A. That has been proven.

Q. That blacks still face problems with regard to employment discrimination in Wake county?

A. I'm sure they do, yes.

Q. And you testified in your deposition that in many instances when the housing authority has attempted to [1217] purchase land and lease public housing in the white community that they have faced opposition?

A. That is correct.

Q. And that some of this opposition was racially motivated?

A. I'm not sure I used that—if you say I said that, and it's in that deposition, then I did. But I don't recall saying it just that way.

Q. Do you believe that?

A. I'm sure that race has something to do with that, certainly.

Q. Now you testified that the southeastern part of Raleigh is where most black people live, is that correct?

A. That is correct.

• • • • •

Q. Are municipal services in the black community [1218] equal to those in the white community?

A. Such as—give me—be very specific on that, if you will.

Q. Such as the paving of streets in the black community?

A. Certainly more—there are probably more unpaved streets in the predominantly black areas of the city than there would be in the predominantly white areas. I'm fairly sure that that's an accurate statement. I don't know what they are. I can't be more specific than that.

Q. Now do you believe that these problems with regard to housing segregation and employment discrimination and the other problems that you mentioned are part of the lingering effect of past discrimination?

A. Oh, I am sure that they are. Yes.

• • • • •

[1219] Q. And you believe that a black office holder has more sensitivity and understanding to the needs of black people?

A. I think that's a very, very good statement.

Q. You've worked in campaigns for various black people who have run for office in Wake county?

A. Almost all of them.

Q. And worked in the campaign for John Baker when he ran for sheriff in 1978?

A. Yes, certainly did.

Q. And in 1982?

A. Yes.

Q. And you are familiar with John Baker's record?

[1220] A. Oh, yes. Record—you mean as sheriff or as what?

Q. You're familiar with him personally?

A. I know John Baker personally, yes.

Q. And you know that John Baker played professional football and was an all-pro prior to being elected, is that correct?

A. Yes, millions of people know that.

Q. And that prior to running for office, his name was well known in the white community?

A. Yes, I'd have to say that he was very well known.

Q. You are also familiar with Acie Ward?

A. Yes.

Q. Is she a black woman lawyer?

A. Yes.

Q. She ran for district court judge in Wake county in 1982?

A. Yes, she did.

Q. She ran as an incumbent?

A. Yes.

Q. She lost?

A. Yeah, Acie Ward ran as an incumbent having sat or whatever the correct English is—having been appointed to the bench and served maybe 6 months and then was—maybe



less than that and then had to run for election to the seat.

[1221] Q. And you believe that race was one of the factors in her defeat?

A. I'm fairly sure that that's not in that deposition. No, I didn't say that. I think I believe I said to you that that may have been a contributing factor but there were some other things, too, that probably attributed to her defeat.

Q. It was one of the factors?

A. Could very well have been one of the factors. I am fairly sure I told you that.

Q. You're familiar with her.

A. Very familiar with her.

Q. And she's the only black person who has ever been elected to the Wake county board of commissioners?

A. She certainly is, yes.

Q. And she does not live in the black community?

A. She does not.

Q. In fact, she lives in an affluent section of Raleigh that's predominantly white?

A. You're quoting me accurately on that.

• • • • •

[1223] Whereupon,

**Malachi J. Green**

was called as a witness, duly sworn, and testified as follows:

DIRECT EXAMINATION 12:25 P.M.

By Mr. Leonard:

• • • • •

[1234] Q. Did Knox and Gantt at one point in their political careers contest one another for the mayor's position in Charlotte?

A. Indeed, they did.

Q. Is one of them black?

A. Harvey Gantt is black.

Q. Is one of them white?

A. Eddie Knox is white.

Q. Who did you support?

A. I supported Eddie Knox.

Q. There's been testimony here that the Knox campaign made overt racial appeals during the Knox-Gantt campaign. Did you observe any of those appeals during that campaign by Knox?

A. I did not, sir.

Q. Or by anybody on his behalf?

A. I did not observe such.

Q. Let me show you what's been—may I approach the witness?

Judge Fnullips: You may.

By Mr. Leonard: Let me show you what's been [1235] marked Gingles exhibit No. 46 which is in evidence and has been identified as an editorial from the—

A. The *Charlotte Observer*.

Q. *Charlotte Observer*, and you'll note I've marked the last two paragraphs. Would you just read those to yourself for the moment, please?

(Witness complies.)

Now, Mr. Green, do you have an opinion as to whether or not those two paragraphs of that editorial constitute a racial appeal or a racial overtone with respect to the candidates in that race?

Ms. Winner: Objection.

Judge Phillips: Overruled.

A. In my opinion, Mr. Leonard, they do not constitute any appeal to race because the divergent and sometimes controversial views that are referred to in the editorial have direct reference to two big issues that were the principal campaign themes.

Q. Did either of those issues have anything to do with race?

A. No, only insofar as any issue has to do with race—public transportation, growth management. Those were the two big issues.

Q. Would you have an opinion as to whether or not the black citizens of the city of Charlotte would have taken [1236] that editorial to be a reflection on the racial background of the two candidates?

A. I can't speak, of course, for all the citizens of Charlotte, but no one ever raised that issue to me or I never heard it discussed during the campaign.

Q. Prior to the time that you and I discussed this last night, had you ever heard it raised by anybody?

A. No.

Q. Was your support for Eddie Knox in that campaign open?

A. Very.

Q. Did people know you were supporting him?

A. Yes, sir.

Q. Did your name at times appear in ads for Mr. Knox?

A. Endorsement ads and every other report. We sponsored all kinds of affairs for him.

[1277]                      RECROSS-EXAMINATION                      3:37 P.M.

By Ms. Winner:

Q. Mr. Green, have you examined the election returns for the general assembly elections in Mecklenburg county for the last four or six years?

[1278] Q. Do you think that race was a factor in defeat of Bertha Maxwell from the general assembly?

A. No.

Q. Do you think that race was a factor in the defeat of Jim Polk when he ran for the senate?

A. Ms. Winner, let me change the answer to that first question. Yeah.

[1279] Q. Do you think that race is a factor in the defeat of Jim Polk when he ran for the Senate?

A. Yeah. You said "a" factor.

Q. A factor. Do you think that race was a factor in the defeat of Jim Richardson when he ran for the house in 1982?

A. Yeah.

Ms. Winner: I don't have any other questions.

EXAMINATION                      3:37 P.M.

By Judge Dupree:

Q. I'm not sure that I understood your answer to a question relating to the relative chance of a black candidate to be elected to the state senate from the Mecklenburg-Cabarrus district as presently constituted. Let me put the question in this way:

Let's assume that we have a Democratic primary in which there are two candidates, one black and one white. Each of them is qualified to represent the district in the senate. In your opinion, does either of those candidates, just on those facts alone, have a better chance to be elected than the other?

A. Yes.

Q. Which one?

A. I think the white person would have a better [1280] chance.

• • • • •

(Whereupon,

**Arthur John Howard Clement, III,**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 3:40 P.M.

By Mr. Leonard:

Q. Would you state your full name and your address, please?

A. I am Arthur John Howard Clement, III. I'm at 2505 Weaver Street, in Durham, North Carolina.

Q. And you are an American who is black and male?

A. Obviously.

• • • • •

[1295] Q. Did you have whites actively participating in your campaign?

A. Very much so.

Q. Do you know any policy of the Durham County Democratic Party which impedes black people from participating in the process in that county?

A. No, I don't.

Q. What's the makeup of the executive committee?

A. The chairman—the chairperson of the executive committee is Mrs. Lucas. She's a black woman. The—most of the other offices—many of the offices—in fact, there's a good mix in the current Democratic party, black, white, women, young people, in the current leadership hierarchy of the Democratic party.

Q. Do you know of any reason why blacks are not able to elect the candidates of their choice for the general assembly in Durham county?

A. Well, if I may, sir, if the Durham committee had given me its endorsement, theoretically I think I could have been in the state legislature today, and Durham county would have had two blacks in the state legislature from Durham county. But the Durham committee did not see fit to give me its endorsement. Consequently I was denied a significant portion of the black vote. Consequently, I lost.

• • • • •

[1300] (Whereupon,

**Allen Adams**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION



By Mr. Leonard:

[1301] Q. Are you currently a member of the General Assembly?

A. I am.

Q. And in the House of Representatives?

A. Yes.

Q. From what county?

A. Wake county.

[1306] Q. What about the formal election board process itself? What's your experience with respect to blacks' participation in the board of elections?

A. Well, I can remember 1960 we started a registration drive called a vote-mobile drive. And that was done in conjunction with the Jaycees and the League of Women Voters. And the vote on the election board was two to one. We got John Duncan's vote, and one Democrat. And one Democrat voted against it. But anyway, we did that, and from then on we have—in the—through the elections process—board process made every effort to make registration and voting available to all the citizens.

At that time we had special emphasis on black [1307] registration because they were underregistered.

Q. You mentioned the precinct level. Are you familiar with blacks holding precinct offices in the county?

A. Yes.

Q. Can you tell the court how long a history that has?

A. Well, it's been ever since I've been in Wake County. There were a number of black precinct chairmen and vice

chairmen. Let me, if I may, Mr. Leonard—I digressed a little bit on the election process. The Wake county board of elections has had a black member since 1968 or '69. J. J. Sanson was appointed by me. And I think there has been continuously since then a black member on the Wake county board of elections. The current chairman of the Wake county board of elections is Rosa Guild, who is black.

[1333] Q. Can you give examples of the Wake county delegation supporting legislation that was of specific interest to the black community?

A. Yes. When the blacks asked us to abolish the single member districts for the school board—as you heard Mr. Malone testify—on the grounds that that diluted the voting influence of black citizens, we introduced a bill over the objection of a number of other elements in the county to set up the mechanism to go to at-large elections for the school board.

That was specifically at the request of the black organizations—the four black organizations: the Raleigh-Wake Citizens Association, the Black Women's Political Caucus, the Wake County Democratic Black Caucus [1334] and the fourth one, which met together. Mr. Winley was presiding. Mr. Malone was there. Substantially every black leader in Wake county was there. And the purpose of the meeting was to ask us to do away with single-member districts in Wake county for the school board because it lessened the influence of the black voters. And we introduced that legislation and have it pending.

Q. Is there a black caucus in the house of representatives?

A. Yes.

Q. Do they at times generate proposals to the legislature out of that caucus?

A. Yes.

Q. Can you recall any such issues in the last two sessions?

A. Yes. Their main program was the voter registration battles that chairman Spearman referred to that the legislature passed. And I introduced one of those. And representative Blue and I and Ballance worked on those in the house election laws committee. And we got all three of them passed.

Wilma Woodard, our senator, was introducing them in the senate and handled the bills in the senate. There were three specific proposals. One was voter [1235] registration in public libraries. The second was to have a voter registrar at each high school. And the third was the Department of Motor Vehicles license examiners giving an opportunity to people when they renew their driver's license to register to vote or change their registration. And all three of those passed.

Q. Was there any legislation in the health field that came out of the caucus?

A. Well, I don't know that it was an official action of the caucus. But Representative Lockes from Robeson county introduced a bill on the sickle cell anemia funds—to have funds for sickle cell—which I understand is peculiarly applicable to blacks. I think only blacks get sickle cell anemia.

And they were interested in that—the caucus was. And that was placed in the budget. In fact, we took the funds out of the governor's block grant funds and funded \$281,000 for sickle cell anemia.

Q. Did all of this legislation which you referred to become law in North Carolina?

A. Yes. It is law now.

• • • • •

[1369] (Whereupon,

**Thomas Brooks Hofeller**

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 10:17 A.M.

By Mr. Leonard:

• • • • •

[1387] Q. Is that information available from the voting records in Mecklenburg county?

A. To the best of my belief, it is.

Q. What else did you observe?

A. Dr. Grofman appears to give a very great weight to the correlation between two variables, where one variable is the percent of black registration and the other variable is the percent of performance by the black candidates?

He went through the data. And he listed out that there were correlation coefficients that were extremely high. And there were significances that were extremely low, which made them very good. And I don't argue that those correlations and significance represent the relationship of those two variables.

I would just like to point out that my opinion is that one would find that sort of correlation between white and black voting behavior in other races where whites and blacks were candidates and in other races in which other

issues were at stake—that the presence of high degree of correlation and high significance does not really prove the causality of his judgment that there is significant racially polarized bloc voting.

[1388] It is very academically exciting to have that correlate so well. But I am not sure that it would be fair to draw the conclusion that it proves his point, especially when evidence is not presented as to whether or not those kinds of voting behaviors are present anywhere else in the state or anywhere else in the nation.

Q. What other observations did you make?

A. Again, in my opinion I think that it is very difficult from my experience in electoral analysis to use just the results of votes as a model for determining what happened in an election. There are a large number of factors—some of which are quantifiable, some of which are non-quantifiable—which are present in any election in any given year, such as the positions of the candidates on issues. After all, elections are decided by issues.

I think it would be naive to assume that every election is decided upon the race of the candidate. Financing is an issue. The general approval rating of the candidate is an issue. The candidate's skill as a candidate and the skill of the persons who are managing his or her campaign are important. Name I.D. is important. Ballot position is important. The general atmosphere in that campaign year is important. The same characteristics for the other candidates are also important.

[1389] So I guess what I am trying to say here is that the correlation analysis and the statistical significance and all that data in the printouts is only one factor in trying to lead to an evaluation of the election. And therefore, one should not necessarily give the weight that one might feel on the correlation over to the other factors when somebody is making a determination.

[1419] CROSS-EXAMINATION 12:05 P.M.

By Ms. Winner:

[1430] A. Submergence with relation to multi-member districts takes place when there is a minority population which is sufficiently concentrated such that a district can be drawn to include that population—a reasonable district—in which that minority would constitute a majority.

But at the same time, the total of all the minority inhabitants of that multi-member district do not constitute a majority of that multi-member district's population.

Q. And when you say a reasonable district could be drawn, do you mean one that is intact and contiguous?

A. Reasonably so. Reasonably so.

Q. Using that definition—I think that you testified that you have examined the concentration of minority voters in Mecklenburg and Forsyth and Durham and Wake counties; is that correct?

A. Along with several other counties in the state also.

Q. But you have examined it in both counties?

A. Yes.

Q. Using that criterion, do you consider there to [1431] be submergence in the Mecklenburg county house district?

A. The multi-member seat?

Q. Yes—in Mecklenburg county? Would you like me to put the map up?

A. I was just going to get the district numbers—district 36?



Q. Yes?

A. Yes. The answer is yes—in accordance with that definition; yes.

Q. Do you consider there to be submergence in the Mecklenburg-Cabarrus senate district, which is senate district number 22?

A. Yes.

Q. Do you consider there to be submergence in the Durham county house district—I can't recall the number?

A. 23; yes.

Q. And do you consider there to be submergence in the Wake county house district number 21?

A. Yes.

Q. And do you consider there to be submergence in the Forsyth county house district number 39?

A. Yes.

Q. Do you consider there to be submergence in the Wilson-Edgecombe-Nash house district number 8?

A. Yes.

• • • • •

[1437] CROSS-EXAMINATION  
(Resumed)

By Ms. Winner:

Q. Dr. Hofeller, have you analyzed the elections in Mecklenburg, Forsyth and Durham and Wake counties to determine whether black voters single-shot vote more than white voters do?

A. Yes.

Q. In your opinion, do black voters have to single-shot vote in order to be able to elect black candidates in those counties?

A. I am not sure that I can say conclusively in every instance that they would have to have single shot. But I think as a general rule the answer would be yes.

• • • • •

[1441] Q. In looking at professor Grofman's results, is it correct that the extreme case analysis and the regression analysis correspond within a few percentage points in almost all of the cases?

A. In many of the cases they do conform rather closely.

Q. In most of the cases?

A. Yes.

Q. Now, you testified that professor Grofman did not have any turnout data or turnout estimate; is that what you said?

A. No. What I said was that I would like to have seen figures on the number of blacks and the number of whites who turned out. Certainly I know that he had Democratic and Republican turnout in those primary elections and general turnout in the general election.

Q. Is there any way to determine the exact number of blacks and whites who voted in each election in each precinct without going and counting the registration cards?

A. Not that I know of.

[1442] Q. In the political science literature, is it standard for political scientists to count registration cards to determine black and white turnout?

A. I am not sure that it has ever been done. But that doesn't mean that it isn't a valid way to operate. I know

that in terms of analyzing political data for vote analysis for trying to win elections and determine elections, there have been times when people have gone to the voter registration forms and affidavits. So it certainly isn't beyond the realm of things you could do.

Q. But it is unusual?

A. If you were just dealing in an academic situation probably you wouldn't go to the trouble of getting that data.

Q. And the reason is that it is extremely time-consuming to do that—and tedious?

A. Again, it is a matter of how extreme you think it is.

Q. But it would be a matter of going through card by card?

A. Yes; definitely.

Q. And determining whether everybody voted and what race they were?

A. Yes.

Q. Have you ever done that in any analysis that [1443] you did?

A. No—not for this kind of a study. Again, I have done it in terms of political analysis—practical politics dealing with real elections. Yes.

Q. But you have not done it for this kind of study?

A. It depends on what you characterize as “this kind of study.”

Q. Are you familiar with the method that Dr. Grofman used for estimating turnout?

A. No. I can't say that I really am.

• • • • •

[1445] Q. Now, do you agree that a standard methodology in political science for determining voting polarization is to look at correlations?

A. Yes.

Q. And that that would be at least one of the steps that should be performed in order to determine whether or not there is substantial significant polarized [1446] voting?

A. Yes.

Q. Would you agree that all of the correlations that Dr. Grofman arrived at or found in his studies were statistically significant?

A. I think I already stated that they were statistically significant.

Q. All of them?

A. He gave the significance factor of them. It was .00001, which was the best that the printout could show.

Q. And you agree that that is statistically significant?

A. I agree that his correlation between those two variables is statistically significant.

• • • • •

[1447] By Ms. Winner:

Q. Looking at defendants' exhibit 14(d), you have testified that Richardson's place on the ballot could have been one of the reasons why he lost; is that correct?

A. Yes. That is correct.

Q. And he is candidate number 8?

A. Yes.

Q. Is it correct that the person next to Richardson—that is, candidate number 7—came in third in that election?

A. Yes.

Q. And that the candidate next to that person, candidate number 6, came in second in the election?

[1448] A. I am not sure that he didn't come in first.

Q. He came in first in the election?

A. Yes.

Q. And that way over on the other page, candidate number 15—who I believe would have been the seventh Republican—got 3,000 more votes than Mr. Richardson got?

A. Yes. I think you have to note, though, of course, the Republicans and Democrats are on a different row in the ballot. And I think that you have to recall that my testimony is that the ballot position has an effect on the votes received. I didn't say it was going to be totally determinant.

Obviously if it were, the top alphabetical candidate would always win every election.

Q. At least in this election, while Mr. Richardson was in eighth place, the candidate who was number 7 in both the Democratic row and the Republican row did substantially better than he did?

A. That is right. But I would say that .3 of 1 percent of vote difference could be accounted for by position on ballot just as any other factor. It could have been that if candidate number 7 were higher on the ballot, he might have gotten more votes.

• • • • •

[1451] Q. Would you say that there was racially polarized voting in the general election in the Mecklenburg county for the senate in 1982?

A. Polarized voting?

Q. Yes.

A. Yes.

Q. In each of the elections contained in exhibits 13 through 18, were there any that did not have racially polarized voting?

A. I do not recall seeing one.

• • • • •

[1454] Q. You did not conduct an investigation of the totality of the circumstances in any of these places; did you?

A. Some of the factors which I mentioned as being necessary to prove or to form an opinion of substantially [1455] significant racially polarized voting are very difficult to obtain. And if one was indeed trying to prove a case on that, one would want to look at them all. And I did not look at them all.

Q. And in fact, when I took your deposition a week and a half ago, you said that you hadn't looked at anything other than the voter returns at that time; isn't that right?

A. That is correct.

• • • • •

[145E] By Ms. Winner:

Q. Prior to your employment in this case, have you ever done an analysis of racially polarized voting?

A. No.



18  
No. 83-1968

Supreme Court, U.S.

FILED

SEP 21 1985

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,  
*Appellants,*

v.

RALPH GINGLES, *et al.*,  
*Appellees.*

On Appeal from the United States District Court  
for the Eastern District of North Carolina

**JOINT APPENDIX EXHIBITS**

**VOLUME I**

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**JURISDICTIONAL STATEMENT FILED JUNE 2, 1984**

**PROBABLE JURISDICTION NOTED APRIL 29, 1985**

66 PG 2  
Foldout

Ex-1

**PUGH/EAGLIN PLAINTIFFS' EXHIBIT NO. 4**

**Table 1-A**  
**Comparison of Black Population and Black**  
**Representation in the North Carolina Legislature**  
**1940-1982**

Year	# of Blacks	Population Total Popu- lation	% Black	NC Senate		NC House	
				# of Blacks	% Black	# of Blacks	% Black
1940	981,298	3,571,623	28	0	0	0	0
1942				0	0	0	0
1944				0	0	0	0
1946				0	0	0	0
1948				0	0	0	0
1950	1,078,808	4,061,929	27	0	0	0	0
1952				0	0	0	0
1954				0	0	0	0
1956				0	0	0	0
1958				0	0	0	0
1960	1,156,870	4,556,155	25	0	0	0	0
1962				0	0	0	0
1964				0	0	0	0
1966				0	0	0	0
1968				0	0	1	.8
1970	1,126,478	5,082,059	23	0	0	2	1.6
1972				0	0	3	2.5
1974				2	4	4	3.3
1976				2	4	4	3.3
1978				1	2	3	2.5
1980	1,316,050	5,874,429	22	1	2	3	2.5
1982				1	2	11 <sup>a</sup>	9.1

Sources: Thad Eure, *North Carolina Legislative Directory* 1981-1982, 1983-1984

Thad Eure, *North Carolina Manual*, Raleigh: Publications Division, 1941-1979

U.S. Bureau of Census, 1940, 1950, 1960, 1970, 1980

<sup>a</sup>Six of these were elected from majority black districts that the General Assembly was forced to draw by the Federal Courts.

# PLAINTIFF'S EXHIBIT

11 App 3 Gingles

## Appendix 3: "Effects of Multimember House and State Senate Districts in Eight North Carolina Counties, 1978-1982"

### CONDENSED SUMMARY TABLE 1

Level of White Voter Support for Black Candidates vs. Black Voter Support for Black Candidates in Eight North Carolina Counties, House and Senate Primary and General Elections in which there was at least one Black Candidate, 1978-1982.

**KEY (X,Y,Z,Q)**  
X = number of black candidates  
Y = total number of candidates (including blacks)  
Z = number of winning candidates  
Q = number of winning black candidates

	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)	PRIMARY	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)
<b>GENERAL</b>					
(5) Mecklenburg & Cabarrus					
(1, 6, 4, 1) 1978 Senate	.41	.94	(1, 5, 4, 1) 1978 Senate	.47	.87
(1, 7, 4, 0) 1982 Senate	.33	.94	(1, 5, 4, 0) 1980 Senate	.21	.78
			(1, 6, 4, 1) 1982 Senate	.32	.83
(9) Mecklenburg					
(1, 6, 4, 1) 1978 Senate	.40	.94	(1, 5, 4, 1) 1978 Senate	.50	.87
(1, 16, 8, 0) 1980 House	.28	.92	(1, 5, 4, 0) 1980 Senate	.25	.79
(1, 7, 4, 1) 1982 Senate	.31	.94	(1, 11, 8, 1) 1980 House	.22	.71
(2, 18, 8, 1) 1982 House	.42	.98	(1, 6, 4, 1) 1982 Senate	.33	.83
			(2, 9, 8, 2) 1982 House	.50	.79
				.39	.71
(5) Cabarrus					
(1, 6, 4, 1) 1978 Senate	.38	.92	(1, 5, 4, 0) 1978 Senate		.75
(1, 7, 4, 0) 1982 Senate	.37	.94	(1, 5, 4, 0) 1980 Senate		.79
			(1, 6, 4, 0) 1982 Senate		.76

Polk wins in 1982 Meck. Sen. gener.  
Alexander loses in 1978 Cabarrus primary.  
Polk loses in 1982 Cabarrus primary.

Ex-2

TABLE 1 (continued)

	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)	PRIMARY	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)
<b>GENERAL</b>					
(6) Durham					
(1, 4, 2, 0) 1978 Senate (Rep. B)	.17	.65	(2, 7, 3, 1) 1978 House	.10	.80
(1, 3, 3, 1) 1978 House	.48	.79	No Primary	.16	.32
(1, 3, 3, 1) 1980 House	.49	.90	(2, 4, 3, 1) 1980 House	.37	.90
(1, 4, 3, 1) 1982 House	.43	.89			
(7) Forsyth					
(2, 9, 5, 0) 1978 House (1 Rep B)	.32	.95	(3, 10, 5, 1) 1978 House	.28	.76
(1, 10, 5, 0) 1980 House	.32	.96	(1, 3, 2, 0) 1980 Senate	.08	.29
(2, 8, 5, 2) 1982 House	.42	.87	(2, 7, 5, 1) 1980 House	.12	.61
(5) Wake			(2, 11, 5, 2) 1982 House	.40	.86
(1, 6, 13, 1) 1980 House	.44	.90	(1, 12, 6, 0) 1978 House	.25	.80
(1, 17, 6, 1) 1982 House	.45	.91	(1, 9, 6, 1) 1980 House	.21	.76
			(1, 15, 6, 1) 1982 House	.31	.81
				.39	.82
(3) F.W.N					
			1982 House	.04	.66
			1982 1st Cong Primary	.02	.84
			1982 2nd Cong Primary	.05	.91
			1982 House	.02	.63
			1982 1st Cong Primary	.02	.84
			1982 2nd Cong Primary	.03	.97
(2, 4, 3, 2) 1982 County Commissioner	.38	.91	(1, 2, 1, 0) 1982 County Commissioner	.00	.14
			(4, 10, 3, 2)	.04	.27
					.75
					.82

Michaux wins in Edgecombe

Ex-3



TABLE 1 (continued)

GENERAL	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)	PRIMARY	Proportion of white voters for black candidate(s)	Proportion of black voters for black candidate(s)
(4) Wilson			1982 House 1982 1st Cong Primary 1982 2nd Cong Primary 1976 County Commissioner	.02 .06 .07 .32	.76 .96 .98 .77
(5) Nash			1976 House 1982 1st Cong Primary 1982 2nd Cong Primary 1982 County Commissioner	.02 .06 .06 .06 .09	.58 .73 .81 .82

In Edgecombe, Wilson and Nash there was only black candidate for House or Senate in the period 1976-1982. Data for these counties are based in addition on a 1976 County Commission race in Wilson, 1982 Congressional Primaries, and Edgecombe and Nash 1982 County Commission Primaries and General Elections.

N = 53

Actual district races = 30 House & Senate (P&G)

4 County Commissioner (P&G)

22 Cong Primaries

36

CONDENSED SUMMARY TABLE 2

Ranking of White Voter Support for Black Candidates vs. Black Voter Support for Black Candidates in Eight North Carolina Counties, House and Senate Primary and General Elections in which there was at least one Black Candidate, 1978-1982 \*

GENERAL	Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)	PRIMARY	Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)
(5) Mecklenburg & Cabarrus					
(1, 6, 4, 1) 1978 Senate	4	1	(1, 5, 4, 1) 1978 Senate	last	1
(1, 7, 4, 0) 1982 Senate	6	1	(1, 5, 4, 0) 1980 Senate	last	1
			(1, 6, 4, 1) 1982 Senate	5	1
(9) Mecklenburg					
(1, 6, 4, 1) 1978 Senate	4	1	(1, 5, 4, 1) 1978 Senate	last	1
(1, 16, 8, 0) 1980 House	last	1	(1, 5, 4, 0) 1980 Senate	last	1
(1, 7, 4, 0) 1982 Senate	6	1	(1, 13, 8, 1) 1980 House	10	1
(2, 18, 8, 1) 1982 House	7	2	(1, 6, 4, 1) 1982 Senate	5	1
			(2, 9, 8, 2) 1982 House	7	2
(5) Cabarrus					
(1, 6, 4, 1) 1978 Senate	5	1	(1, 5, 4, 0) 1978 Senate	last	1
(1, 7, 4, 0) 1982 Senate	6	1	(1, 5, 4, 0) 1980 Senate	last	1
			(1, 6, 4, 0) 1982 Senate	5	1
(6) Durham					
(1, 4, 2, 0) 1978 Senate (Rep B)	last	3	1978 House	last	2
(1, 3, 3, 1) 1978 House	last	1	(2, 7, 3, 1) No Primary	6	1
(1, 3, 3, 1) 1980 House	last	1	(2, 4, 3, 1) 1982 House	next to last	1
(1, 4, 3, 1) 1982 House	3	1			
(7) Forsyth					
(2, 9, 5, 0) 1978 House (1 Rep B)	last	6	(3, 10, 5, 1) 1978 House	7	3
(1, 16, 5, 0) 1980 House	last	1	(1, 3, 2, 0) 1980 Senate	last	2
(2, 8, 5, 2) 1982 House	last	2	(2, 7, 5, 1) 1980 House	next to last	1
			(2, 11, 5, 2) 1982 House	8	2

Ex-5

Alexander loses in 1978 Cabarrus primary.  
Palk loses in 1982 Cabarrus primary.

TABLE 2 (continued)

	GENERAL		PRIMARY		Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)
	Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)				
(5) Wake	6	1	(1, 12, 6, 0)	1978 House	9	1
(1, 13, 6, 1)	3	1	(1, 9, 6, 1)	1980 House	8	1
(1, 17, 6, 1)			(1, 15, 6, 1)	1982 House	5	1
(3) E-W-N			1982 House	(1, 7, 4, 0)	last	1
			1982 1st Cong Primary	(1, 3, 2, 1)	last	1
			1982 2nd Cong Primary	(1, 2, 1, 0)	last	1
(5) Edgecombe			1982 House	(1, 7, 4, 0)	last	1
			1982 1st Cong Primary	(1, 3, 2, 1)	last	1
			1982 2nd Cong Primary	(1, 2, 1, 1)	last	1
(2, 4, 3, 2)	2	3	1982 County Commissioner	(4, 10, 3, 2)	last tied for last	4 3 2 1
(4) Wilson			1982 House	(1, 7, 4, 0)	last	1
			1982 1st Cong Primary	(1, 3, 2, 0)	last	1
			1982 2nd Cong Primary	(1, 2, 1, 0)	last	1
			1976 County Commissioner	(1, 13, 7, 0)	11	1

Ex-6

Michaux wins in Edgecombe only

TABLE 2 (continued)

	GENERAL		PRIMARY		Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)
	Ranking of white voters for black candidate(s)	Ranking of black voters for black candidate(s)				
(4) Nash			1976 House	(1, 7, 4, 0)	7	1
			1982 1st Cong Primary	(1, 3, 2, 1)	tied for last	1
			1982 2nd Cong Primary	(1, 2, 1, 0)	last	1
			1982 County Commissioner	(1, 6, 3, 0)	6	1

\*In Edgecombe, Wilson and Nash there was only black candidate for House or Senate in the period 1978-1982. Data for those counties are based in addition on a 1976 County Commission race in Wilson, 1982 Congressional Primaries, and Edgecombe and Nash 1982 County Commission Primaries and General Elections.

N = 53  
Actual district races = 30 House & Senate (P&G)  
4 County Commissioner (P&G)  
2 Cong Primaries  
36

Ex-7

# CONDENSED SUMMARY TABLE 3

Level of White Voter Support for Black Candidates vs. Black Voter Support for Black Candidates in Eight North Carolina Counties, House and Senate Primary and General Elections in which there was at least one Black Candidate, 1978-1982.\*

Ex-8

GENERAL	Proportion of the votes cast by white voters which go to the black candidate(s)		Proportion of the votes cast by black voters which go to the black candidate(s)		PRIMARY	Proportion of the votes cast by white voters which go to the black candidate(s)		Proportion of the votes cast by black voters which go to the black candidate(s)	
	P <sub>wn</sub>	P <sub>bm</sub>	P <sub>wn</sub>	P <sub>bm</sub>		P <sub>wn</sub>	P <sub>bm</sub>	P <sub>wn</sub>	P <sub>bm</sub>
(5) Mecklenburg & Cabarrus (1, 6, 4, 1) 1978 Senate	.16		.38		(1, 5, 4, 1) 1978 Senate	.16		.53	
(1, 7, 4, 0) 1982 Senate	.11		.46		(1, 5, 4, 0) 1980 Senate	.09		.52	
					(1, 6, 4, 1) 1982 Senate	.12		.49	
(9) Mecklenburg (1, 6, 4, 1) 1978 Senate	.15		.38		(1, 5, 4, 1) 1978 Senate	.17		.55	Alexander loses in 1978 Cabarrus primary.
(1, 16, 8, 0) 1980 House	.05		.23		(1, 5, 4, 0) 1980 Senate	.09		.53	
(1, 7, 4, 1) 1982 Senate	.11		.47		(1, 13, 8, 1) 1980 House	.04		.34	
(2, 18, 8, 1) 1982 House	.12		.48		(1, 6, 4, 1) 1982 Senate	.11		.53	
(5) Cabarrus (1, 6, 4, 1) 1978 Senate	.14		.31		(2, 9, 8, 2) 1982 House	.17		.54	Polk loses in 1982 Cabarrus primary
(1, 7, 4, 0) 1982 Senate	.13		.27		(1, 5, 4, 0) 1978 Senate	.15		.37	
					(1, 5, 4, 0) 1980 Senate	.09		.37	
					(1, 6, 4, 0) 1982 Senate	.16		.38	
(6) Durham (1, 4, 2, 0) 1978 Senate (Rep. B)	.12		.463		(2, 7, 3, 1) 1978 House	.10		.59	
(1, 3, 3, 1) 1978 House	.28		.36		No Primary 1980 House	x		x	
(1, 3, 3, 1) 1980 House	.32		.35		(2, 4, 3, 1) 1982 House	.35		.91	
(1, 4, 3, 1) 1982 House	.26		.78						
(7) Forsyth (2, 9, 5, 0) 1978 House (1 Rep B)	.16		.34		(3, 10, 5, 1) 1978 House	.14		.63	
(1, 10, 5, 0) 1980 House	.07		.24		(1, 3, 2, 0) 1980 Senate	.07		.51	
(2, 8, 5, 2) 1982 House	.21		.55		(2, 7, 5, 1) 1980 House	.15		.55	
					(2, 11, 5, 2) 1982 House	.15		.55	

Ex-9

TABLE 3 (continued)

GENERAL	Proportion of the votes cast by white voters which go to the black candidate(s)		Proportion of the votes cast by black voters which go to the black candidate(s)		PRIMARY	Proportion of the votes cast by white voters which go to the black candidate(s)		Proportion of the votes cast by black voters which go to the black candidate(s)	
	P <sub>wn</sub>	P <sub>bm</sub>	P <sub>wn</sub>	P <sub>bm</sub>		P <sub>wn</sub>	P <sub>bm</sub>	P <sub>wn</sub>	P <sub>bm</sub>
(5) Wake (1, 13, 6, 1) 1980 House	.03		.19		(1, 12, 6, 0) 1978 House	.05		.40	
(1, 17, 6, 1) 1982 House	.03		.18		(1, 9, 6, 1) 1980 House	.09		.50	
					(1, 15, 6, 1) 1982 House	.10		.41	
(3) E-W-N					1982 House 1982 1st Cong Primary	.01		.36	
					1982 2nd Cong Primary	.02		.50	
					(1, 2, 1, 0) Primary	.35		.94	
(5) Edgecombe					1982 House 1982 1st Cong Primary	.01		.31	Michaux wins in Edgecombe only
					1982 2nd Cong Primary	.02		.92	
					1982 County Commissioner	.02		.99	
					(4, 10, 3, 2) Commissioner	.02		.87	
(2, 4, 3, 2) 1982 County Commissioner	.40		.68		(1, 7, 4, 0) 1978 House	.01		.52	
(4) Wilson					1982 1st Cong Primary	.07		.98	
					1982 2nd Cong Primary	.07		.99	
					1976 County Commissioner	.05		.30	



TABLE 3 (continued)

GENERAL	Proportion of the votes cast by white voters which go to the black candidate(s)	Proportion of the votes cast by black voters which go to the black candidate(s)	PK/MARY	Proportion of the votes cast by white voters which go to the black candidate(s)	Proportion of the votes cast by black voters which go to the black candidate(s)
(5) Nash			1976 House	.01	.31
			1982 1st Cong Primary	.07	.79
			1982 2nd Cong Primary	.06	.82
			1982 County Commissioner	.04	.49

\*In Edgecombe, Wilson and Nash there was only black candidate for House or Senate in the period 1976-1982. Data for those counties are based in addition on a 1976 County Commission race in Wilson, 1982 Congressional Primaries, and Edgecombe and Nash 1982 County Commission Primaries and General Elections.

N = 53

Actual district races = 30 House & Senate (P&G)

4 County Commissioner (P&G)

2 Cong Primaries

36

## PLAINTIFF'S EXHIBIT 11, APP. 6#4 Gingles

## APPENDIX 6 to "Effects 'Multimember Districts' Black Legislative Representation in States with Black Population over 15%

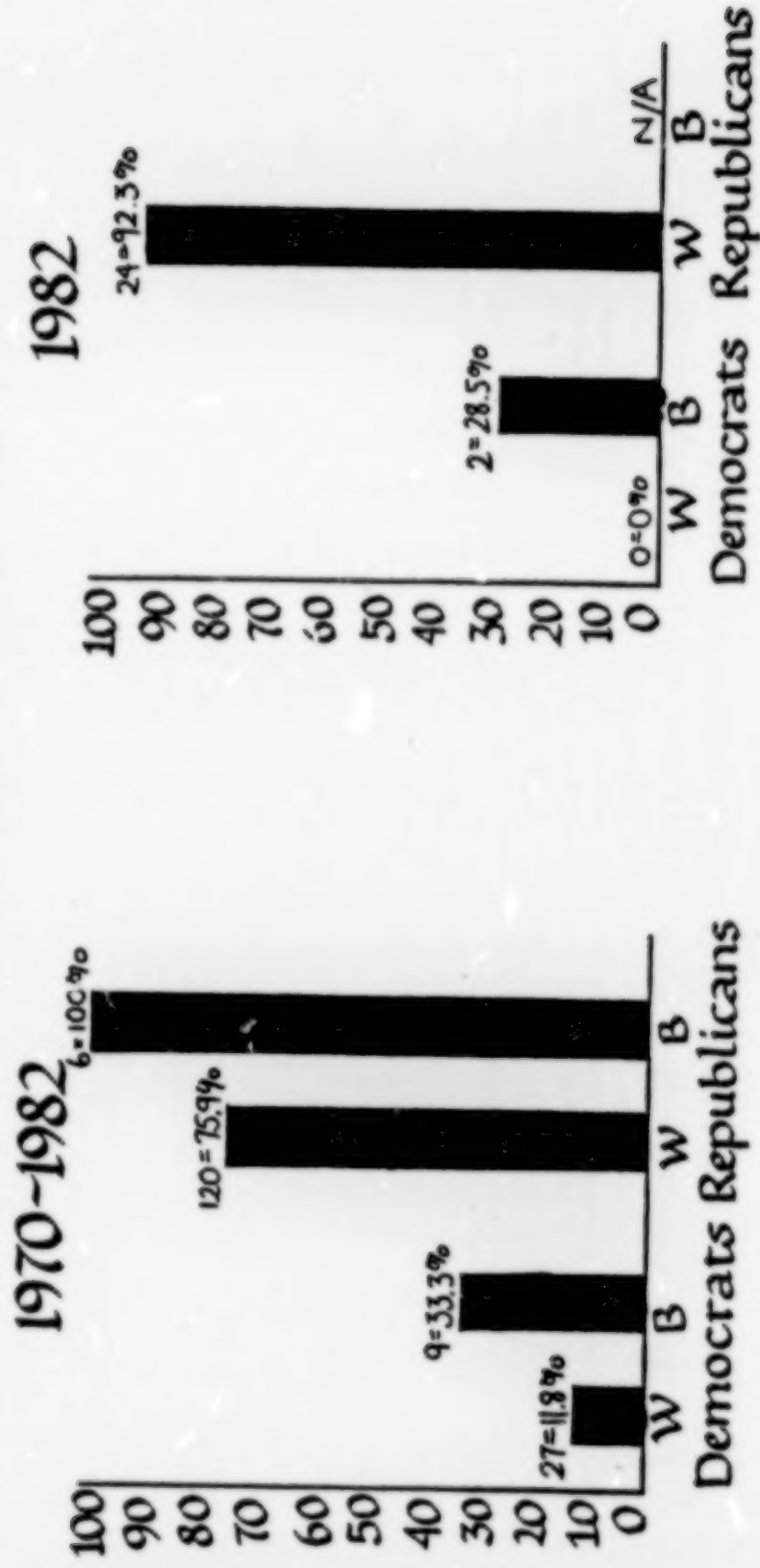
Percent population Black (1970)	Predominantly single member districts in areas of Black concentration as of July 1977	# of Black Reps. in July 1977	Predominantly single member districts in areas of Black concentration as of July 1982	# of Black Reps. in July 1982	Predominantly single member districts in areas of Black concentration as of July 1983	# of Black Reps. in July 1983
Alabama	YES	15	YES	16	YES	20
Arkansas	NO	4	NO	5	NO	5
Florida	NO	3	NO	5	YES	12
Georgia	YES	23	YES	22	YES	24
Louisiana	YES	10	YES	13	YES	13
Maryland	0	19	0	21	00	23
Mississippi	NO	4	YES	17	YES	17
North Carolina	NO	6	NO	4	YES & NO	13
South Carolina	YES	13	YES	15	YES	20
Tennessee	YES	11	YES	12	YES	13
Virginia	NO	2	NO	5	NO	7

Average # of Black Representatives in States with Predominantly Single Member Districts in Black Areas 3.8 (TOTAL = 19, N = 5) 4.8 (TOTAL = 19, N = 4) 6 (TOTAL = 12, N = 2) 1977 (omitting Maryland) 1982 (omitting Maryland) 1983 (omitting N.C. & Maryland)

Average # of Black Representatives in States with Predominantly Single Member Districts in Black Areas 14.5 (TOTAL = 72, N = 5) 15.8 (TOTAL = 95, N = 6) 18.4 (TOTAL = 129, N = 7)

\*3 member districts used throughout. Blacks only elected from majority Black municipalities of 1, 2, and 3 person districts. Blacks only elected from majority Black municipalities and states, with one exception

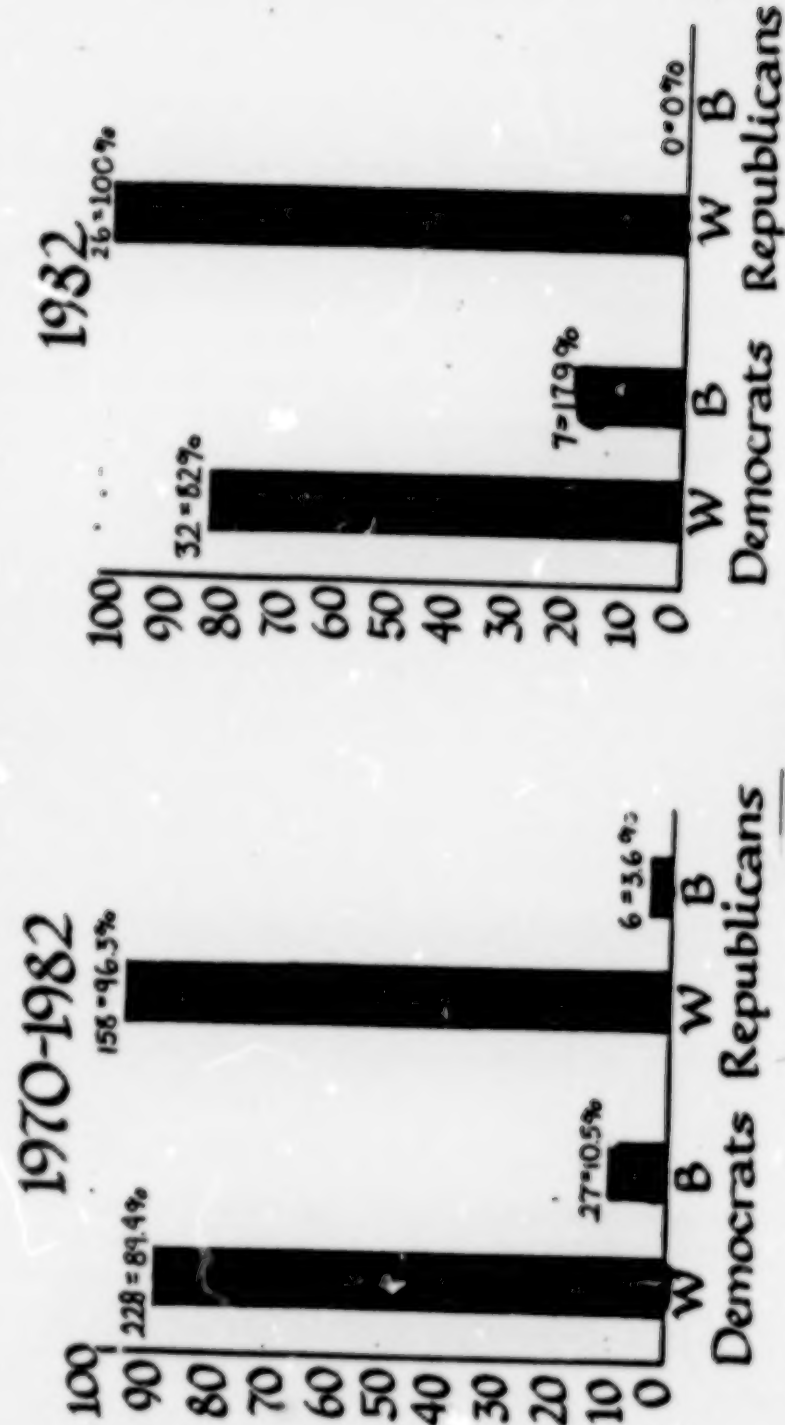
# Success in General Elections (% of candidates that lose by party by race)



Ex-12

Gingles  
Exhibit 19

# Participation in General Elections (% of candidates of each party by race)



Ex-13

EXHIBIT 19  
Gingles

**PLAINTIFF'S EXHIBIT 20 GINGLES**  
**The Disadvantageous Effects of At-Large Elections**  
**On the Success of Minority Candidates**  
**For the Charlotte and Raleigh City Councils**

Bernard Grofman  
 Professor of Political Science  
 School of Social Sciences  
 University of California, Irvine  
 Irvine, California

May 20, 1983

**I. Campaign Expenditures in the District-Based  
 and At-Large Component of the Charlotte City Council and  
 Raleigh City Council Elections in 1979 and 1981**

We would like to test the hypothesis that at-large elections are more expensive to run than district-based campaigns. Intuitively it would seem very reasonable that at-large elections, involving as they do larger constituencies, would be more costly.<sup>1</sup> However, there are a number of methodological problems in empirically validating what might appear common sensically obvious; even though the few available studies (e.g., Grofman 1982; Jewell 1982) all support the truth of the proposed hypothesis:

(1) There are differences in spending patterns between incumbents and non-incumbents. Moreover, those differences are complicated by the considerable incumbency advantage in raising money versus the countervailing lesser need of highly visible incumbents to spend money to win elections. Also the magnitude of the incumbency

<sup>1</sup>Campaign funds are often spent somewhat differently in at-large than in district elections; for the latter, use of city-wide media (e.g., radio, TV, city newspapers) is less efficient than for the former and this may reduce somewhat the cost advantages produced by the smaller scope of district-based campaigns.

advantage is often different in at-large than in single member district elections.

(2) Both at-large and district races contain candidates who run with little chance of victory (and with minimal campaign expenses), but the number of such candidates is generally greater in at-large elections.

(3) Many candidates largely finance city council campaigns through their own funds, and such personal resources vary widely, introducing idiosyncratic features which are hard to control for because of the small number of mixed system elections for which we have campaign funding data available for analysis.

Nonetheless, each of these methodological problems associated with analyzing comparative campaign expenditures across different types of election systems may be solved (or at least mitigated) if (1) we distinguish between incumbent and non-incumbent expenditures (2) for both incumbents and non-incumbents we focus on the expenditures of the *winning* candidates, and (3), we combine data so as to obtain a larger sample size and more reliable data estimates. We shall look at Charlotte City Council and Raleigh City Council campaign expenditure patterns, combining 1979 and 1981 data.

In Charlotte there were four at-large seats and seven district seats in both the 1979 and 1981 elections (see Appendices 1 and 2). Combining data for the two elections we find winners at large averaged over \$12,000 on campaign expenditures (whether they were incumbent or non-incumbent); while in the district based elections, winning challengers spent only \$5,815 and winning incumbents spent only \$3,198 (see Table 1). Thus, campaign costs in Charlotte City Council at-large elections were, on average, more than twice those for district elections in that city.



In Raleigh, for both the 1979 and the 1981 election, there were two at-large seats and five district seats (see Appendices 3 and 4). Combining data for the two elections we find incumbent winners at-large spent an average of \$9,105 while incumbent district winners spent an average of only \$5,344; non-incumbent at-large winners spent an average \$11,925 while non-incumbent district winners spent on average only \$5,213. Thus, at-large campaign costs in Raleigh at-large city council elections were, on average, roughly twice those for district elections in that city.

## **II. Success of Black Candidates in the District-Based and At-Large Component of Charlotte City Council and Raleigh City Council Election**

The considerably higher expenditures required to run a successful at-large race in Charlotte imposes a burden on minority groups (such as blacks) who are economically disadvantaged. This financial burden, combined with racial bloc voting which makes for a greater difficulty of black success in at-large race with a primarily white electorate as compared to a district race with a primarily Black electorate (e.g., Charlotte Districts 2-3), has meant that Blacks are disproportionately excluded from the at-large council seats in Charlotte. In the period 1977-1981, of the 21 district seats contested, Blacks won 6 (28.6%); while of the 12 at-large seats contested Blacks won only 2 (16.7%), despite the fact that there were more Black candidates for the four at-large seats than for the seven district seats. In the preceding period, 1945-1975, under a pure at-large system, Black representation was even less, averaging only 5.4% (Heilig and Mundt 1981; see also Heilig, 1978; Mundt 1979).

As in Charlotte, Black electoral success in Raleigh was considerably greater in the district than in the at-large component of the city council elections in 1977-1981. Of

the 15 district seats contested, Blacks won three (20.0%), while of the six at-large seats contested, Blacks won no seats (0.0%), despite the fact that there were proportionally about as many Black candidates contesting the at-large elections as contesting the district elections. This finding of greater minority success in a district-based system (or the district-based component of a mixed system) than under an at-large or multi-member district system has been repeated in a large number of municipalities and other jurisdictions where there exists a substantial minority population and patterns of polarized voting (see esp. Engstrom and McDonald 1981; Karnig and Welch 1978, 1979; Grofman 1981; and overviews of the literature in Engstrom and McDonald 1984 forthcoming and in Grofman 1982b).

"Indeed, few generalizations in political science appear to be as well verified as the proposition that at-large elections tend to be discriminatory toward black Americans" (Engstrom and McDonald, 1984 forthcoming).

## **III. Summary**

We examined the campaign expenditure patterns for the at-large and district components of Charlotte and Raleigh, North Carolina city council elections and found that successful at-large election campaigns are more expensive to run than successful district campaigns. We then looked at the success of black candidates in recent Charlotte and Raleigh city council races and found dramatically greater success for black candidates running in the district-based elections than for those running for the city-wide seats. In reducing their likelihood of obtaining office if they do seek it, and/or in increasing the amount of money which must be spent to achieve office, at-large elections in Charlotte and Raleigh had a discriminatory effect on Black candidates, when compared with district elections in the same cities.

**Table 1<sup>1</sup>**  
**Campaign Expenses: Charlotte City Council, 1979-1981**

	Winning Incumbents <sup>2</sup>		Winning Non-Incumbents	
	At-large	District	At-large	District
1979 expenditures		\$ 554		None
		1,684		
		1,907 (N = 2)		
		2,699		
		5,784		
average (N = 2)	\$5,706			
	4,945			
	\$5,326			
		\$3,031 (N = 5)		
1981 expenditures				
		\$3,119		\$8,717
		1,936		2,913
		2,777 average		
		4,531 (N = 2)		\$5,815
average (N = 2)	\$18,452			
	19,639			
	\$19,061 (N = 5)			
		\$3,433 (N = 5)		
1979 and 1981 combined				
average (N = 4)	\$12,194 (N = 12)			
	\$4,198 (N = 9)			

<sup>1</sup>There were not enough winning black candidates to make it feasible to separately tabulate by race of candidate. The raw data on which this table was based is provided as appendices to this research note.

<sup>2</sup>In 1979 and 1981 all incumbents running for reelection to the Charlotte City Council won reelection. In 1979 9 of 11 incumbents sought reelection; in 1981, 7 of 11 did.

Ex-18

**Table 1<sup>2</sup>**  
**Campaign Expenses: Raleigh City Council, 1979-1981**

	Winning Incumbents		Winning Non-Incumbents	
	At-large	District	At-large	District
1979 expenditures		\$15,723		\$8,962
		4,187		\$8,962
		257		
		5,048		
		\$ 6,304		
average (N = 1)	\$3,598			
	\$3,598			
1981 expenditures				
		\$5,310		\$1,463
		1,301		\$1,463
		\$4,383 (N = 1)		
average (N = 1)	\$14,611 (N = 4)			
	\$14,611			
1979 and 1981 combined				
average (N = 2)	\$9,105 (N = 8)			
	\$5,344 (N = 2)			

<sup>1</sup>There were not enough winning black candidates to make it feasible to separately tabulate by race of candidate. The raw data on which this table was based is provided as appendices to this research note.

Ex-19

# WHITE PEOPLE WAKE UP

BEFORE IT'S TOO LATE

**YOU MAY NOT HAVE ANOTHER CHANCE**

**DO YOU WANT?**

Negroes working beside you, your wife and daughters in your mills and factories?

Negroes eating beside you in all public eating places?

Negroes riding beside you, your wife and your daughters in buses, cabs and trains?

Negroes sleeping in the same hotels and rooming houses?

Negroes teaching and disciplining your children in school?

Negroes sitting with you and your family at all public meetings?

Negroes going to white schools and white children going to Negro schools?

Negroes to occupy the same hospital rooms with you and your wife and daughters?

Negroes as your foremen and overseers in the mills?

Negroes using your toilet facilities?

PLAINTIFF'S  
EXHIBIT

25

Gingles

Northern political labor leaders have recently ordered that all doors be opened to Negroes on union property. This will lead to whites and Negroes working and living together in the South as they do in the North. Do you want that?

**FRANK GRAHAM FAVORS MINGLING OF THE RACES**

HE ADMITS THAT HE FAVORS MIXING NEGROES AND WHITES — HE SAYS SO IN THE REPORT HE SIGNED. (For Proof of This, Read Page 167, Civil Rights Report.)

**DO YOU FAVOR THIS -- WANT SOME MORE OF IT?**

**IF YOU DO, VOTE FOR FRANK GRAHAM**

**BUT IF YOU DON'T**

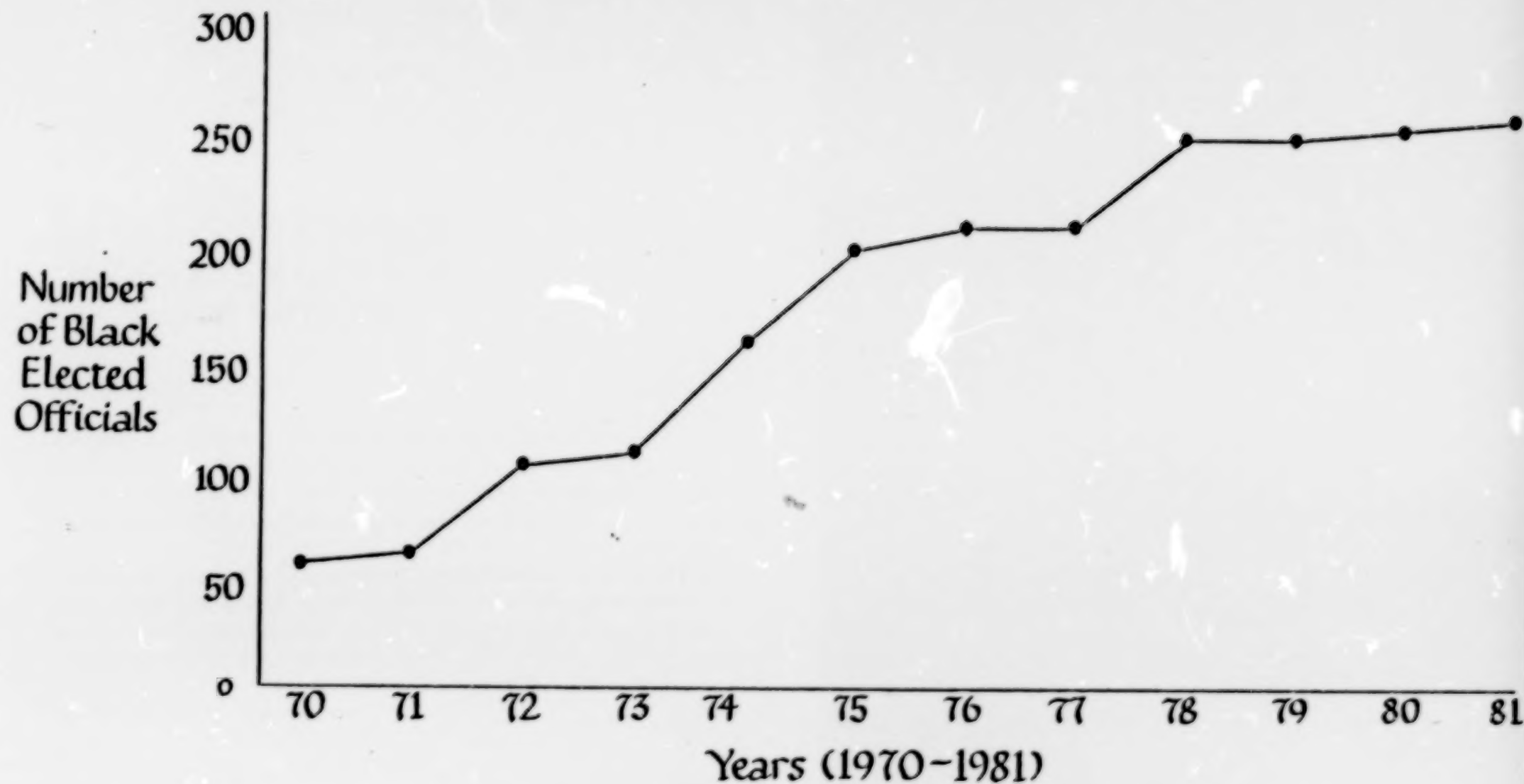
**VOTE FOR AND HELP ELECT**

**WILLIS SMITH for SENATOR**

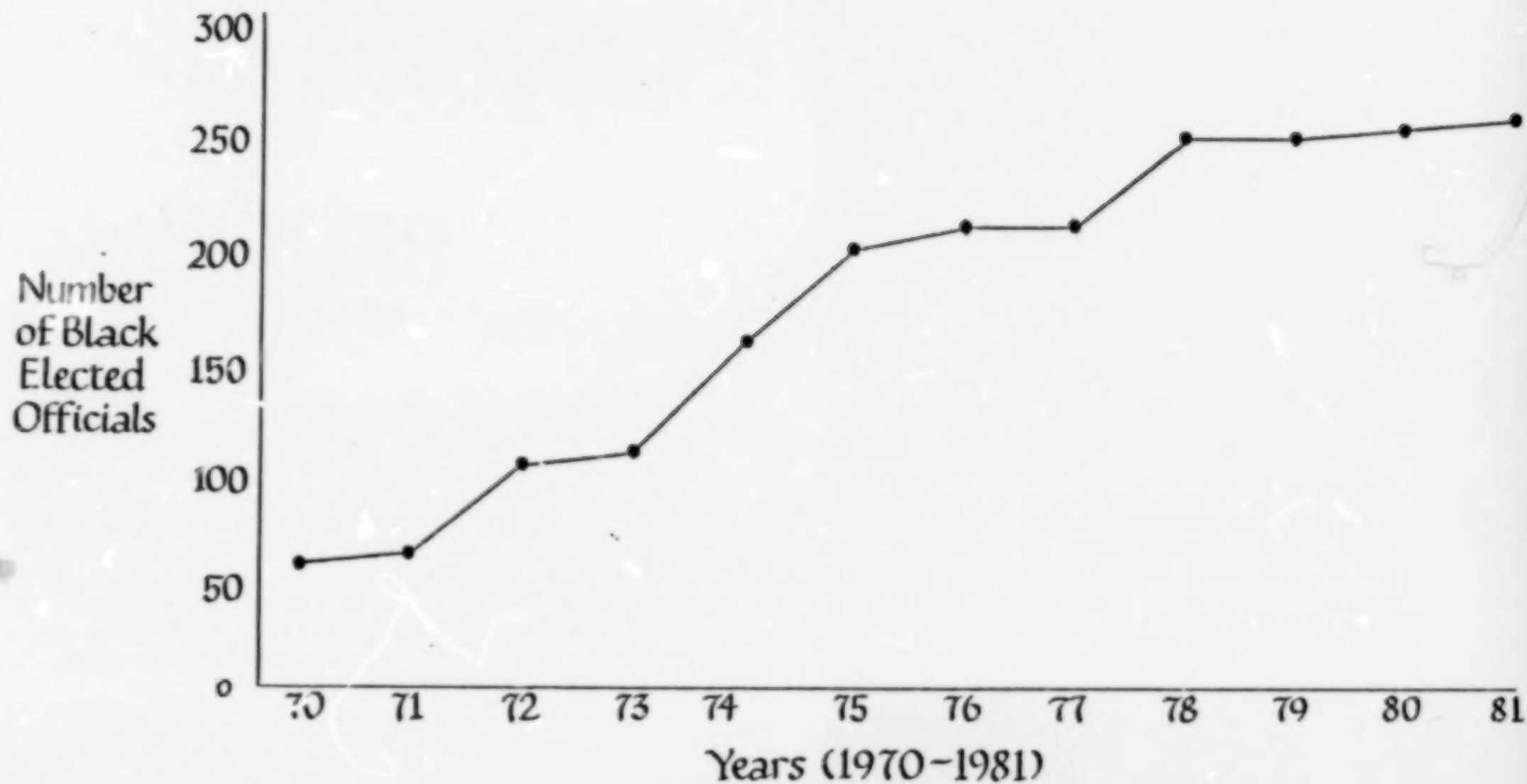
**HE WILL UPHOLD THE TRADITIONS OF THE SOUTH**

**KNOW THE TRUTH COMMITTEE**





Number of Black Elected Officials  
in North Carolina (1970-1981)



Number of Black Elected Officials  
in North Carolina (1970-1981)

Ex-23

PLAINTIFF'S EXHIBIT

52

Gingles

**Vote**  
**Valentine**  
**For Congress**

Dear Fellow Democrat:

Tuesday, July 27th is a very important day for Democrats in Durham County. It is a day when you have a chance and obligation to influence the direction in which our national government will move during the critical years ahead.

That choice is whether you want to be represented in Congress by a big-government, free-spending liberal, or whether you want to be represented by a person whose thinking is much more in tune with the majority of our people.

I think the choice is very clear.

My opponent's liberal record is well-known.

While serving in the state legislature, among other things, he sponsored a bill which would have raised your personal income taxes by as much as 40 percent.

He also sponsored a bill which could have forced you to pay dues to a labor union whether you wanted to or not.

I am opposed to his kind of liberal thinking and I believe the majority of the people in our district are too.



Ex-24

I want you to know that I am opposed to higher taxes. I plan to introduce a constitutional amendment which would require a balanced federal budget, which would force the government to live within its means.

That would cause interest rates to come down which would revive agriculture, help industry grow and create more jobs for our people, thereby bringing down unemployment.

I have also made a commitment to open a fully-staffed Congressional Office in Durham, so that you will never be more than a local phone call away from help with your problems with the Federal Government.

I know it's July and it's hot. Many folks are on vacation. Many are busy with tobacco. It's easy not to stop and take the time to vote, but you must.

Our polls indicate that the same well organized block vote which was so obvious and influential on the 1st Primary will turn out again on July 27. My opponent will again be bussing his supporters to the polling places in record numbers.

If you and your friends don't vote on July 27 my opponent's block vote will decide the election for you.

## A Congressman We Can Be Proud Of

Paid for by the Tim Valentine for Congress Committee.  
C.T. Lane, Treasurer, P.O. Box 353, Rocky Mount, N.C. 27801  
A copy of our report is filed with the Clerk of the House and is available for purchase from The Federal Election Commission, Washington, D.C. 20515

Ex-25

Your vote will make the difference.

Please join me in voting on Tuesday, July 27. I promise to be a Congressman of whom you can be proud.

Sincerely,

Tim  
Valentine

P.S.

### CALL TO ACTION

Please take the time to become personally involved in my campaign by listing below the names of five friends and neighbors, along with their telephone numbers, and call them on Tuesday, July 27 to make sure that each one votes.

NAME

TELEPHONE #

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Vote  
**Valentine**  
For Congress

Ex-26

# **Vote Valentine For Congress**

Durham Headquarters  
202 Corcoran Street  
Durham, N.C. 27701

July 21, 1982

Dear Registered Voter,

We ask that you consider the voting pattern and results of the June 29 primary. There were many many precincts in Durham that voted over 60% of their registration, while our precinct only voted around 45%.

If you object to this domination—if you are resentful of having others elect your officials—then you should vote on July 27.

Join us in proving to ourselves that Tim Valentine can carry Club Boulevard precinct.

Regards,

Jim Dickson

Ex-27

From the Durham Morning Herald

June 30, 1982

<u>Precinct</u>	<u>Valentine</u>	<u>Michaux</u>	<u>Ramsey</u>
Club Blvd.	264	209	282
Burton	9	1260	14
Hillside	1	883	9
Whitted	1	419	5
Shepard	2	744	9
Hillandale	302	192	313

## **A Strong Voice For Our District**

Paid for by the Tim Valentine for Congress Committee.  
C.T. Lane, Treasurer, P.O. Box 353, Rocky Mount, N.C. 27801  
A copy of our report is filed with the Clerk of the House and is available for purchase from The Federal Election Commission, Washington, D.C. 20515

## DEFENDANT'S EXHIBIT 1

STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

## MEMBERS

MRS. ELLOREE M. ERWIN  
CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
HORSE SHOE

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

November 30, 1981

## SPECIAL MEMORANDUM

SUBJECT: Increased Voter Registration

FROM: Robert W. Spearman, Chairman  
Alex K. Brock, Director

TO: All County Board Members and Supervisors

At its meeting on November 9, 1981, the State Board of Elections adopted and endorsed the goal of increased voter registration in North Carolina as a top Board priority.

The Board has directed us to communicate with each of you about its interest and concern in this important area.

A successful effort to increase voter registration will require pooling the efforts, talents, energy and ideas of

local board members, supervisors, elected officials, state board members and staff with the political parties, civic groups and all interested citizens.

We would request that at your next local board meeting you consider what specific steps can be taken in your county and statewide to make it easier and more convenient for citizens to register to vote. We also request you provide our board with the voting age population in your county, based on the most recent U.S. census.

We would very much appreciate any guidance and suggestions you can give us as to steps the state board and its staff can take to increase registration, whether those be by adopting or altering regulations, recommending legislation to the General Assembly, sponsoring registration drives or other techniques.

We are aware that certain voter registration techniques work better in some areas than in others. Among the approaches that you may wish to consider using in your county are:

1. Running public service spots on TV or radio telling citizens the specific times and places they can register.
2. Encourage local political parties to work with precinct judges, registrars and special registration commissioners to have special voter registration days at community centers, schools and shopping centers.
3. Request local county (and municipal) officials to include information about how and where one can register in mailings that are routinely sent out from county or city offices (e.g., with tax listing notices, water and sewer bills, etc.).
4. In counties where such a system is not already in place, work with local library officials and library trustees to have public library employees designated as



Ex-30

special library registration deputies. (This is already authorized by G.S. 163-80 (6).)

5. Use supervisors, deputy supervisors of elections and local election board members as registrars for special registration efforts in schools, community centers, nursing homes, etc. (This is already authorized by G.S. 163-35 and 163-80.)

We very much look forward to working with you on voter registration and we would certainly appreciate any suggestions you can pass along to us.

DUPLICATE THIS FOR ALL BOARD MEMBERS

Ex-31

## DEFENDANT'S EXHIBIT 2

STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

### MEMBERS

MRS. ELLOREE M. ERWIN  
CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
HORSE SHOE

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

December 14, 1981

TO: NORTH CAROLINA COUNTY ELECTIONS BOARDS AND  
SUPERVISORS

Recently questions have been raised concerning compensation of registrars, judges and special registration commissioners in voter registration efforts. Often the questions have come up when a civic or community group desires to have a qualified person eligible to register voters present at a rally, picnic, dinner or some other community occasion. In such situations, the following principles should be followed.

1. Under State law any registrar, judge of election or special registration commissioner can register voters anywhere in the county without regard to the precinct of the applicant unless the local board has restricted the authority of the registrar, judge or special commissioner. G.S. 173-67.

The State Board strongly encourages the use of registrars, judges and special registration commissioners for

special registration efforts and suggests that any local board rules restricting their authority be reexamined.

2. There is no state law requirement that registrars, judges or special registration commissioners be compensated for registering voters. Frequently registrars and judges register voters (as opposed to performing their election day duties) on a volunteer basis without pay. (However, some county boards do pay for special registration work performed at public libraries or other places, and it is perfectly proper to do so.)

3. Private groups may not compensate registrars, election judges, or special registration commissioners. G.S. 163-275.

4. If a private group (e.g. civic club, community association, etc.) is willing to or desires to reimburse a county for the cost of paying registrars for special registration efforts it may properly do so. The proper procedure to follow is for the group to make a contribution to the board of county commissioners for the purpose of special voter registration and the commissioners could then appropriate the funds to the local Board of Elections for such purpose.

---

Robert W. Spearman  
Chairman, State Board of  
Elections

---

Alex K. Brock  
Executive Secretary-Director,  
State Board of Elections

---

Senior Deputy Attorney General

DUPLICATE FOR ALL BOARD MEMBERS

## DEFENDANT'S EXHIBIT 3

STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

MEMBERS

MRS. ELLOREE M. ERWIN  
CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
HORSE SHOE

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

January 29, 1982

TO: COUNTY BOARD MEMBERS AND SUPERVISORS

FROM: BOB SPEARMAN, CHAIRMAN  
ALEX BROCK, EXECUTIVE DIRECTOR

SUBJECT: CITIZEN AWARENESS YEAR AND VOTER  
REGISTRATION

At the request of the State Board of Elections, Governor James Hunt has designated 1982 as a Citizen Awareness Year in which a maximum effort will be made to increase North Carolina voter registration.

The State Board will sponsor two major voter registration drives, from April 15, 1982 to July 5, 1982 before the primary and from September 1 to October 4 (when registration closes for the general election.)

The voter registration drive is officially sponsored and is nonpartisan. All political parties and civic groups are invited and encouraged to participate.

Obviously, the success of this effort will depend very much upon you because you are the public officials most familiar with the election process and closest to its day-to-day operation.

There will be two main thrusts to the voter registration drive: (1) Maximum publicity of existing voter registration opportunities and (2) Provision of special registration opportunities to maximize participation.

The State Board intends to take all possible steps to maximize statewide publicity, including holding press conferences and providing public service spots to radio and television stations. We request that your local board take similar steps in your county or municipality. Specifically, you may wish to consider the following:

Check with local T.V. and radio stations to determine if they will produce and broadcast public service spots telling county citizens when and where they can register to vote. (The spot announcements can be made by different board members.)

Issue press releases on Citizen Awareness Year in your area and registration opportunities.

Post signs or notices with registration information in public places (e.g. county offices, stores, community bulletin boards.)

Check with county and municipal officials to see if they would agree to have basic voter registration information included with routine official mailings (e.g. with tax notices or municipal water bills.)

#### Special Registration Opportunities.

In addition to publicizing existing registration opportunities, we need to take extra steps to reach groups whose registration has historically been low. Situations vary in different areas of the State, but frequently groups with low registration include elderly citizens, young people, and

minority groups. We request you consider using the following outreach techniques during Citizen Awareness Year, particularly from April 15, 1982 to July 5, 1982 and September 1 to October 4, 1982.

1. Staff registration tables in evening hours at places where large groups of people congregate (shopping centers are often excellent.)

2. Have a "registration day" in the spring and again in the fall in local public high schools and community colleges; on these days send registrars and commissioners to register students and faculty at their educational institutions.

3. Send registrars or commissioners for special registration events to residential areas where registration is low. These may include nursing homes, public housing or mobile home parks.

4. Upon request, supply registrars or commissioners for special events being run by community groups, such as banquets, dinners, picnics, athletic contests, church suppers, etc. (Very frequently, this can be done without any cost to the board because registrars or commissioners will donate their time and not expect to be paid.)

We expect that local boards will receive requests from political parties and community groups for assistance in special registration efforts during Citizens Awareness Year.

When you receive such requests, try to be as helpful as you can in answering questions, supplying voter registration information and where necessary, helping to find registrars, judges, and special registration commissioners who can assist in registering voters at special events.



Paid Pol. Adv.

## WHAT NORTH CAROLINA NEWSPAPERS SAY ABOUT VOTER REGISTRATION



GOV. HUNT, REV. JACKSON MEET — Governor Jim Hunt and the Rev. Jesse Jackson met in the Executive Mansion March 11 to discuss a number of mutual concerns, including voter registration . . .

*The Carolinian*, 3-18-82

"He (Jesse Jackson) said Gov. Jim Hunt, an expected Senate candidate in 1984, had 'a limited future—unless we register.'"

*Greensboro Daily News*, 5-16-83

"We must register at least 200,000 black voters in North Carolina in the next two months." (Jesse Jackson)

*News and Observer*, 4-22-83

"Gov. James B. Hunt, Jr. wants the State Board of Elections to boost minority voter registration in North Carolina . . ."

*Chapel Hill Newspaper*, 11-10-81

**Ask Yourself:  
Is This A Proper Use Of Taxpayer Funds?**

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**GINGLES EXHIBIT #56**

**Mecklenburg County—Demographic Data**

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	291,442	107,006	404,270
Percent of Population	72.1	26.5	
Percent of Population Below Poverty	5.5	25.7	10.9
Percent of Family Income over \$20,000	61.7	27.9	53.6
Mean Income	27,209	15,519	24,462
Ratio Black to White Mean Income	57.0%		
Total Number of Housing Units	111,223	34,209	
Number of Renter Occupied	36,949	2,056	
Percent Renter Occupied	33.2	60.1	
Percent Units with No Vehicle Available	5.0	26.5	10.0
Percent Over 25 with Eighth Grade Education or Less	9.9	25.0	
Percent Voting Age Population that is Black (1980)	24.0		
Percent Voters that is Black (1980)	16.9		

## GINGLES EXHIBIT #57

## Forsyth County—Demographic Data

	White	Black	Total
Population	182,647	59,403	243,683
Percent of Population	75.0	24.4	
Percent of Population Below Poverty	6.9	25.6	11.6
Percent of Family Income over \$20,000	56.2	28.6	50.2
Mean Income	25,355	15,101	23,188
Ratio Black to White Mean Income	59.56%		
Total Number of Housing Units	69,699	19,885	
Number of Renter Occupied	19,320	11,934	
Percent Renter Occupied	27.7	60.0	
Percent Units with No Vehicle Available	5.9	27.4	10.7
Percent Over 25 with Eighth Grade Education or Less	16.7	26.6	
Percent Voting Age Population that is Black (1980)	22.0		
Percent Voters that is Black (1980)	20.3		

## GINGLES EXHIBIT #58

## Durham County—Demographic Data

	White	Black	Total
Population	95,818	55,424	152,785
Percent of Population	62.7	36.3	
Percent of Population Below Poverty	7.6	24.9	14.0
Percent of Family Income over \$20,000	57.8	28.5	47.9
Mean Income	24,984	15,357	21,719
Ratio Black to White Mean Income	-61.47%		
Total Number of Housing Units	36,792	18,343	
Number of Renter Occupied	13,953	11,462	
Percent Renter Occupied	37.9	62.5	
Percent Units with No Vehicle Available	6.9	25.2	13.0
Percent Over 25 with Eighth Grade Education or Less	14.6	26.6	
Percent Voting Age Population that is Black (1980)	33.6		
Percent Voters that is Black (1980)	24.9		



## GINGLES EXHIBIT #59

## Wake County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	231,561	65,553	301,327
Percent of Population	76.8	21.8	
Percent of Population Below Poverty	6.2	23.4	10.0
Percent of Family Income over \$20,000	63.7	28.7	56.8
Mean Income	26,893	15,347	24,646
Ratio Black to White Mean Income	57.07%		
Total Number of Housing Units	85,664	19,793	
Number of Renter Occupied	29,609	11,021	
Percent Renter Occupied	34.6	55.7	
Percent Units with No Vehicle Available	4.5	21.0	7.6
Percent Over 25 with Eighth Grade Education or Less	9.3	28.2	
Percent Voting Age Population that is Black (1980)			
Percent Voters that is Black (1980)			

## GINGLES EXHIBIT #60

## Wilson County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	39,943	22,981	63,132
Percent of Population	63.3	36.4	
Percent of Population Below Poverty	9.6	37.8	20.0
Percent of Family Income over \$20,000	57.7	17.1	36.5
Mean Income	21,687	12,241	18,732
Ratio Black to White Mean Income	56.44%		14.0
Total Number of Housing Units	14,725	6,781	
Number of Renter Occupied	4,818	4,368	
Percent Renter Occupied	32.7	64.4	
Percent Units with No Vehicle Available	7.1	29.1	14.0
Percent Over 25 with Eighth Grade Education or Less	23.0	44.2	
Percent Voting Age Population that is Black (1980)	32.4		
Percent Voters that is Black (1980)	23.0		

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## GINGLES EXHIBIT #61

## Edgecombe County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	27,428	28,433	55,988
Percent of Population	49.0	50.3	
Percent of Population Below Poverty	9.6	30.5	20.2
Percent of Family Income over \$20,000	44.2	20.2	33.3
Mean Income	20,476	13,592	17,360
Ratio Black to White Mean Income	-66.38%		
Total Number of Housing Units	10,246	8,117	
Number of Renter Occupied	2,782	4,258	
Percent Renter Occupied	27.2	52.5	
Percent Units with No Vehicle Available	7.7	26.2	16.0
Percent Over 25 with Eighth Grade Education or Less	23.8	40.3	
Percent Voting Age Population that is Black (1980)	46.7		
Percent Voters that is Black (1980)	34.6		

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## GINGLES EXHIBIT #62

## Nash County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	44,745	22,089	67,153
Percent of Population	66.6	32.9	
Percent of Population Below Poverty	8.9	41.8	19.9
Percent of Family Income over \$20,000	46.7	13.9	37.5
Mean Income	21,785	11,434	18,937
Ratio Black to White Mean Income	52.49%		
Total Number of Housing Units	16,982	6,391	
Number of Renter Occupied	4,933	3,763	
Percent Renter Occupied	29.0	58.9	
Percent Units with No Vehicle Available	6.7	27.2	12.3
Percent Over 25 with Eighth Grade Education or Less			
Percent Voting Age Population that is Black (1980)	29.4		
Percent Voters that is Black (1980)	13.2		

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## GINGLES EXHIBIT #63

## Halifax County—Demographic Data

	White	Black	Total
Population	27,559	26,053	55,286
Percent of Population	49.8	47.1	
Percent of Population Below Poverty	12.6	47.8	
Percent of Family Income over \$20,000	37.9	12.9	27.1
Mean Income	19,042	10,465	15,479
Ratio Black to White Mean Income	- 54.96%		
Total Number of Housing Units	10,680	7,201	
Number of Renter Occupied	2,800	3,520	
Percent Renter Occupied	26.2	48.9	
Percent Units with No Vehicle Available	10.2	32.3	19.0
Percent Over 25 with Eighth Grade Education or Less	25.6	51.5	
Percent Voting Age Population that is Black (1980)			
Percent Voters that is Black (1980)	44.0	35.2	

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## GINGLES EXHIBIT #64

## Northampton County—Demographic Data

	White	Black	Total
Population	8,824	13,709	22,584
Percent of Population	39.1	60.7	
Percent of Population Below Poverty	11.6	38.2	28.1
Percent of Family Income over \$20,000	34.9	15.3	24.0
Mean Income	15,964	12,942	16,080
Ratio Black to White Mean Income	64.83%		
Total Number of Housing Units	3,248	3,849	
Number of Renter Occupied	549	1,261	
Percent Renter Occupied	16.9	32.8	
Percent Units with No Vehicle Available	10.5	27.9	19.9
Percent Over 25 with Eighth Grade Education or Less	23.1	54.6	
Percent Voting Age Population that is Black (1980)	56.2		
Percent Voters that is Black (1980)	51.4		



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## GINGLES EXHIBIT #65

## Hertford County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	10,285	12,810	23,368
Percent of Population	44.0	54.8	
Percent of Population Below Poverty	10.4	34.7	24.3
Percent of Family Income over \$20,000	41.8	20.5	31.2
Mean Income	20,465	13,194	16,946
Ratio Black to White Mean Income	64.47%		
Total Number of Housing Units	3,727	3,709	
Number of Renter Occupied	950	1,452	
Percent Renter Occupied	25.5	39.1	
Percent Units with No Vehicle Available	10.0	28.1	19.2
Percent Over 25 with Eighth Grade Education or Less	21.9	48.1	
Percent Voting Age Population that is Black (1980)	56.2		
Percent Voters that is Black (1980)	51.4		

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## GINGLES EXHIBIT #66

## Gates County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	4,192	4,664	8,875
Percent of Population	47.2	52.6	
Percent of Population Below Poverty	7.9	30.5	19.7
Percent of Family Income over \$20,000	43.4	22.1	33.4
Mean Income	21,025	13,204	17,380
Ratio Black to White Mean Income	-62.8%		
Total Number of Housing Units	1,605	1,274	
Number of Renter Occupied	265	343	
Percent Renter Occupied	16.5	26.9	
Percent Units with No Vehicle Available	7.2	21.9	13.7
Percent Over 25 with Eighth Grade Education or Less	21.3	43.4	
Percent Voting Age Population that is Black (1980)	-49.4		
Percent Voters that is Black (1980)	-47.8		

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## GINGLES EXHIBIT #67

## Milledgeville County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	14,334	11,555	25,948
Percent of Population	55.2	44.5	
Percent of Population Below Poverty	10.8	40.3	24.1
Percent of Family Income over \$20,000	*	*	*
Mean Income	*	*	*
Ratio Black to White Mean Income	*		
Total Number of Housing Units	*		
Number of Renter Occupied	*		
Percent Renter Occupied	*		
Percent Units with No Vehicle Available	*		
Percent Over 25 with Eighth Grade Education or Less	25.2	47.9	
Percent Voting Age Population that is Black (1980)			
Percent Voters that is Black (1980)	40.6	33.1	

\*not available

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## GINGLES EXHIBIT #68

## Bertie County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	8,488	12,441	21,024
Percent of Population	40.6	59.2	
Percent of Population Below Poverty	13.2	40.7	29.4
Percent of Family Income over \$20,000	32.0	12.8	22.0
Mean Income	17,649	12,502	15,008
Ratio Black to White Mean Income	70.8%		
Total Number of Housing Units	3,346	3,533	
Number of Renter Occupied	678	1,293	
Percent Renter Occupied	20.3	36.6	
Percent Units with No Vehicle Available	8.8	24.2	16.6
Percent Over 25 with Eighth Grade Education or Less	28.8	45.1	
Percent Voting Age Population that is Black (1980)	54.5		
Percent Voters that is Black (1980)	44.2		

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## GINGLES EXHIBIT #69

## Washington County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	8,346	6,410	14,801
Percent of Population	56.4	43.3	
Percent of Population Below Poverty	10.9	35.9	21.7
Percent of Family Income over \$20,000	48.5	22.4	38.9
Mean Income	20,868	13,019	17,998
Ratio Black to White Mean Income	62.39%		
Total Number of Housing Units	3,052	1,670	
Number of Renter Occupied	596	624	
Percent Renter Occupied	19.5	37.4	
Percent Units with No Vehicle Available	7.6	30.1	15.6
Percent Over 25 with Eighth Grade Education or Less	22.2	43.9	
Percent Voting Age Population that is Black (1980)	39.1		
Percent Voters that is Black (1980)	34.0		

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## GINGLES EXHIBIT #70

## Chowan County—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	7,294	5,210	12,558
Percent of Population	58.1	41.5	
Percent of Population Below Poverty	8.8	45.4	24.0
Percent of Family Income over \$20,000	41.5	9.5	29.1
Mean Income	20,622	10,704	16,877
Ratio Black to White Mean Income	51%		
Total Number of Housing Units	2,765	1,559	
Number of Renter Occupied	587	738	
Percent Renter Occupied	21.2	47.3	
Percent Units with No Vehicle Available	7.5	30.3	15.8
Percent Over 25 with Eighth Grade Education or Less	23.2	48.9	
Percent Voting Age Population that is Black (1980)	38.1		
Percent Voters that is Black (1980)	31.2		



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GINGLES EXHIBIT #70A

North Carolina—Demographic Data

	<u>White</u>	<u>Black</u>	<u>Total</u>
Population	4,460,570	1,219,054	5,881,766
Percent of Population	75.8	22.4	
Percent of Population Below Poverty	10.0	30.4	14.8
Percent of Family In- come over \$20,000	43.8	21.5	39.2
Mean Income	21,008	13,648	19,544
Ratio Black to White Mean Income	64.3%		
Total Number of Housing Units	1,624,372	391,379	
Number of Renter Occupied	442,009	191,925	
Percent Renter Occupied	27.2	49.03	
Percent Units with No Vehicle Available	7.3	25.1	10.8
Percent Over 25 with Eighth Grade Educa- tion or Less	22.0	34.6	
Percent Voting			

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DEFENDANT'S EXHIBIT 1

STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

MEMBERS

MRS. ELLOREE M. ERWIN  
CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
HORSE SHOE

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

November 30, 1981

SPECIAL MEMORANDUM

SUBJECT: Increased Voter Registration

FROM: Robert W. Spearman, Chairman  
Alex K. Brock, Director

TO: All County Board Members and Supervisors

At its meeting on November 9, 1981, the State Board of Elections adopted and endorsed the goal of increased voter registration in North Carolina as a top Board priority.

The Board has directed us to communicate with each of you about its interest and concern in this important area.

A successful effort to increase voter registration will require pooling the efforts, talents, energy and ideas of

local board members, supervisors, elected officials, state board members and staff with the political parties, civic groups and all interested citizens.

We would request that at your next local board meeting you consider what specific steps can be taken in your county and statewide to make it easier and more convenient for citizens to register to vote. We also request you provide our board with the voting age population in your county, based on the most recent U.S. census.

We would very much appreciate any guidance and suggestions you can give us as to steps the state board and its staff can take to increase registration, whether those be by adopting or altering regulations, recommending legislation to the General Assembly, sponsoring registration drives or other techniques.

We are aware that certain voter registration techniques work better in some areas than in others. Among the approaches that you may wish to consider using in your county are:

1. Running public service spots on TV or radio telling citizens the specific times and places they can register.
2. Encourage local political parties to work with precinct judges, registrars and special registration commissioners to have special voter registration days at community centers, schools and shopping centers.
3. Request local county (and municipal) officials to include information about how and where one can register in mailings that are routinely sent out from county or city offices (e.g., with tax listing notices, water and sewer bills, etc.).
4. In counties where such a system is not already in place, work with local library officials and library trustees to have public library employees designated as

special library registration deputies. (This is already authorized by G.S. 163-80 (6).)

5. Use supervisors, deputy supervisors of elections and local election board members as registrars for special registration efforts in schools, community centers, nursing homes, etc. (This is already authorized by G.S. 163-35 and 163-80.)

We very much look forward to working with you on voter registration and we would certainly appreciate any suggestions you can pass along to us.

DUPLICATE THIS FOR ALL BOARD MEMBERS

## DEFENDANT'S EXHIBIT 2

STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

## MEMBERS

MRS. ELLOREE M. ERWIN  
CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
Horse Shoe

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

December 14, 1981

TO: NORTH CAROLINA COUNTY ELECTIONS BOARDS AND  
SUPERVISORS

Recently questions have been raised concerning compensation of registrars, judges and special registration commissioners in voter registration efforts. Often the questions have come up when a civic or community group desires to have a qualified person eligible to register voters present at a rally, picnic, dinner or some other community occasion. In such situations, the following principles should be followed.

1. Under State law any registrar, judge of election or special registration commissioner can register voters anywhere in the county without regard to the precinct of the applicant unless the local board has restricted the authority of the registrar, judge or special commissioner. G.S. 173-67.

The State Board strongly encourages the use of registrars, judges and special registration commissioners for

special registration efforts and suggests that any local board rules restricting their authority be reexamined.

2. There is no state law requirement that registrars, judges or special registration commissioners be compensated for registering voters. Frequently registrars and judges register voters (as opposed to performing their election day duties) on a volunteer basis without pay. (However, some county boards do pay for special registration work performed at public libraries or other places, and it is perfectly proper to do so.)

3. Private groups may not compensate registrars, election judges, or special registration commissioners. G.S. 163-275.

4. If a private group (e.g. civic club, community association, etc.) is willing to or desires to reimburse a county for the cost of paying registrars for special registration efforts it may properly do so. The proper procedure to follow is for the group to make a contribution to the board of county commissioners for the purpose of special voter registration and the commissioners could then appropriate the funds to the local Board of Elections for such purpose.

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Robert W. Spearman  
Chairman, State Board of  
Elections

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Alex K. Brock  
Executive Secretary-Director,  
State Board of Elections

---

Senior Deputy Attorney General

DUPLICATE FOR ALL BOARD MEMBERS



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**DEFENDANT'S EXHIBIT 3**

**STATE BOARD OF ELECTIONS**  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601

ROBERT W. SPEARMAN  
CHAIRMAN

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CHARLOTTE

WILLIAM A. MARSH, JR.  
DURHAM

MRS. RUTH TURNER SEMASHKO  
Horse Shoe

ROBERT W. SPEARMAN  
RALEIGH

JOHN A. WALKER  
NORTH WILKESBORO

January 29, 1982

TO: COUNTY BOARD MEMBERS AND SUPERVISORS

FROM: BOB SPEARMAN, CHAIRMAN  
ALEX BROCK, EXECUTIVE DIRECTOR

SUBJECT: CITIZEN AWARENESS YEAR AND VOTER  
REGISTRATION

At the request of the State Board of Elections, Governor James Hunt has designated 1982 as a Citizen Awareness Year in which a maximum effort will be made to increase North Carolina voter registration.

The State Board will sponsor two major voter registration drives, from April 15, 1982 to July 5, 1982 before the primary and from September 1 to October 4 (when registration closes for the general election.)

The voter registration drive is officially spon-

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sored and is nonpartisan. All political parties and civic groups are invited and encouraged to participate.

Obviously, the success of this effort will depend very much upon you because you are the public officials most familiar with the election process and closest to its day-to-day operation.

There will be two main thrusts to the voter registration drive: (1) Maximum publicity of existing voter registration opportunities, and (2) Provision of special registration opportunities to maximize participation.

The State Board intends to take all possible steps to maximize statewide publicity, including holding press conferences and providing public service spots to radio and television stations. We request that your local board take similar steps in your county or municipality. Specifically, you may wish to consider the following:

Check with local T.V. and radio stations to determine if they will produce and broadcast public service spots telling county citizens when and where they can register to vote. (The spot announcements can be made by different board members.)

Issue press releases on Citizen Awareness Year in your area and registration opportunities.

Post signs or notices with registration information in public places (e.g. county offices, stores, community bulletin boards.)

Check with county and municipal officials to see if they would agree to have basic voter registration information included with routine official mailings (e.g. with tax notices or municipal water bills.)

Special Registration Opportunities.

In addition to publicizing existing registration opportunities, we need to take extra steps to reach groups

whose registration has historically been low. Situations vary in different areas of the State, but frequently groups with low registration include elderly citizens, young people, and minority groups. We request you consider using the following outreach techniques during Citizen Awareness Year, particularly from April 15, 1982 to July 5, 1982 and September 1 to October 4, 1982.

1. Staff registration tables in evening hours at places where large groups of people congregate (shopping centers are often excellent.)

2. Have a "registration day" in the spring and again in the fall in local public high schools and community colleges; on these days send registrars and commissioners to register students and faculty at their educational institutions.

3. Send registrars or commissioners for special registration events to residential areas where registration is low. These may include nursing homes, public housing or mobile home parks.

4. Upon request, supply registrars or commissioners for special events being run by community groups, such as banquets, dinners, picnics, athletic contests, church suppers, etc. (Very frequently, this can be done without any cost to the board because registrars or commissioners will donate their time and not expect to be paid.)

We expect that local boards will receive requests from political parties and community groups for assistance in special registration efforts during Citizens Awareness Year.

When you receive such requests, try to be as helpful as you can in answering questions, supplying voter registration information and where necessary, helping to find registrars, judges, and special registration commissioners who can assist in registering voters at special events.

## DEFENDANT'S EXHIBIT

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### North Carolina Voter Registration February, 1982-October, 1982

	White Voters Registered	Non-White Voters Registered	All Voters Registered
2/9/82	2,081,836	401,962	2,483,798
3/31/82	2,108,211	416,735	
6/1/82	2,160,579	455,368	
10/4/82	2,201,189	470,638	2,671,827
Absolute Increase			
2/9/82 to 6/1/82	78,743	53,406	132,149
% increase			
2/9/82 to 6/1/82	3.7%	13.2%	5%
Absolute Increase			
2/9/82 to 10/4/82	119,353	68,676	188,029
% increase			
2/9/82 to 10/4/82	5.7%	17%	7.5%

\* \* \* \* \*

### Approximate Percent of Voting Age Population\* Registered

2/9/82	58.6%
6/1/82	61.7%
10/4/82	63.1%

\*based upon February, 1982 population statistics.

**Voter Registration Increases For Selected Counties From  
February 1982 to October 1982**

County	Increase White		Increase Non-White		Total % Increase All Voters
	Registered Voters	% Increase	Registered Voters	% Increase	
Forsyth	4,105	4%	2,880	13%	6%
Mecklenburg	6,493	4%	2,896	9%	5%
Wake	4,416	4%	2,292	11%	5%
Durham	2,246	5%	3,565	21%	9%
Nash	802	4%	1,620	37%	10%
Edgecombe	215	2%	3,310	54%	19%
Wilson	952	5%	2,193	46%	14%
Halifax	676	5%	2,507	36%	16%
Bertie	431	10%	1,126	32%	20%
Chowan	131	3%	223	14%	6%
Gates	141	6%	451	21%	13%
Hertford	456	9%	1,143	31%	18%
Martin	202	3%	539	16%	7%
Northampton	1,029	22%	1,903	42%	32%
Washington	195	4%	403	18%	9%

**DEFENDANT'S EXHIBIT 15**

**STATE BOARD OF ELECTIONS  
SUITE 801 RALEIGH BUILDING  
5 WEST HARGETT STREET  
RALEIGH, NORTH CAROLINA 27601**

**ROBERT W. SPEARMAN**  
CHAIRMAN

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**MRS. ELLOREE M. ERWIN**  
CHARLOTTE

**WILLIAM A. MARSH, JR.**  
DURHAM

**MRS. RUTH TURNER SEMASHKO**  
HORSE SHOE

**ROBERT W. SPEARMAN**  
RALEIGH

**JOHN A. WALKER**  
NORTH WILKESBORO

January 14, 1983

Governor James B. Hunt

State Capital

Raleigh, North Carolina

Representative J. Worth  
Gentry

Lieutenant Governor James  
Green

North Carolina House of  
Representatives

Legislative Office Building  
Raleigh, North Carolina

Raleigh, North Carolina

Speaker Liston Ramsey

North Carolina House of

Representatives

Raleigh, North Carolina

Senator Wilma C. Woodard  
North Carolina State Senate  
Raleigh, North Carolina

Gentlemen and Senator Woodard:

In recent months the North Carolina Board of Elections has given careful consideration to possible recommendations to you concerning the conduct and administration of the election laws.



We have received proposals from interested citizens, political parties, county election boards and other groups.

We wish to recommend the following six items for legislative action in the 1983 Session. As you are aware the State board and County Boards have in the last year made extensive efforts to ease access to voter registration, and our recommendations include several items in this very important area.

1. Authorization to permit the State Election Board to name Department of Motor Vehicle drivers license examiners as special registration commissioners.

This would enable citizens to complete voter registration application when they obtain or renew their driver's license. Such a system has worked very well in Michigan; it has recently been recommended by Governor Robb in Virginia and voters in Arizona adopted it by referendum in the recent November election. This proposal is supported by the North Carolina Division of Motor Vehicles.

2. Legislation to permit voter registration at public high schools with school librarians as registrars.

We are all aware that registration rates among young people are low and need to be raised. This proposal should lead to substantial registration increases.

3. Require public libraries to permit voter registration. Public library registration has been extremely successful in many counties in the state. The concept is strongly supported by county election boards.

4. Legislation providing for simultaneous issuance of absentee ballot application and absentee ballot itself.

This reform would reduce postage costs and make it easier for qualified persons to vote absentee without eliminating any of our existing safeguards.

5. Amendment of G.S. 163-22.1 to permit State Elections Board to order a new election when legally

appropriate, after hearings have been held and findings of fact made by a county board.

This would clarify the authority of the State Board to order a new election without unnecessarily duplicating hearings already held by a county board. The amendment would save time, money and expedite the resolution of election contests.

6. Authorization of constitutional amendment to grant State Board authority to issue regulations to deal with "out of precinct" voting problem.

Citizens and election officials alike are frustrated by the situation where persons move from one precinct to another within a county but fail to transfer their registration. When registration has not been changed by election day citizens either lose their right to vote or vote improperly in their old precinct. A constitutional amendment is apparently needed here because the 30 day residency requirement for a precinct for eligibility to vote is a constitutional requirement.

In addition to these six proposals we also suggest that the appropriate House and Senate committees may well wish to review the operation and administration of Article 23 and 24 or Chapter 163 regarding municipal elections and consider whether all municipalities should contract to have municipal elections administered by county election boards.

We look forward to working with you on these matters.

With best wishes,

Robert W. Spearman  
Chairman, State Board of Elections

Alex K. Brock  
Executive Director  
State Board of Elections

RWS/ehd

cc: Members, State Board of Elections  
James Bullock

OCT 2 1985

JOSEPH F. SPANIO,  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

**LLOYD H. THORNBURG, et al.,**

*Appellants,*

**v.**

**RALPH GINGLES, et al.,**

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

**BRIEF FOR APPELLEES**

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### QUESTIONS PRESENTED

- (1) Does section 2 of the Voting Rights Act require proof that minority voters are totally excluded from the political process?
- (2) Does the election of a minority candidate conclusively establish the existence of equal electoral opportunity?
- (3) Did the district court hold that section 2 requires either proportional representation or guaranteed minority electoral success?



- (4) Did the district court correctly evaluate the evidence of racially polarized voting?
- (5) Was the district court's finding of unequal electoral opportunity "clearly erroneous"?

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## STATEMENT OF THE CASE<sup>1</sup>

This is an action challenging the districting plan adopted in 1982 for the election of the North Carolina legislature. North Carolina has long had the smallest percentage of blacks in its state legislature of any state with a substantial black population.<sup>2</sup> Prior to this litigation no more than 4 of the 120 state representatives, or 2 of the 50 state

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<sup>1</sup> The opinion of the district court as reprinted in the appendix to the Jurisdictional Statement has two significant typographical errors. The Appendix at J.S. 34a and 36a states, "Since then two black citizens have run successfully in the (Mecklenburg Senate district) ..." and "In Halifax County, black citizens have run successfully..." Both sentences of the opinion actually read "have run unsuccessfully." (Emphasis added). Due to these and other errors, the opinion has been reprinted in the Joint Appendix, at JA5-JA58.

<sup>2</sup> See Joint Center for Political Studies, National Roster of Black Elected Officials (1984) 14, 16-17; JA Ex. Vol. I, Ex. I.

senators, were black.<sup>3</sup> Although blacks are 22.4% of the state population, the number of blacks in either house of the North Carolina legislature had never exceeded 4%. The first black was not elected to the House until 1968, and the first black state senator was not elected until 1974. North Carolina makes greater use of at large legislative elections than most other states; under the 1982 districting plan 98 of the 120 representatives and 30 of the 50 state senators were to be chosen from multi-member districts.<sup>4</sup>

In July 1981, following the 1980 census, North Carolina initially adopted a redistricting plan involving a total of 148 multi-member and 22 single member dis-

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<sup>3</sup> Stip. 96, JA 94-5.

<sup>4</sup> Stip. Ex. BB and EE, Chapters 1 and 2 Sess. Laws of 2nd Extra Session 1982, JA 67.

tricts.<sup>5</sup> Under this plan every single House and Senate district had a white majority.<sup>6</sup> There was a population deviation of 22% among the proposed districts.

Forty of North Carolina's 100 counties are covered by section 5 of the Voting Rights Act; accordingly, the state was required to obtain preclearance of those portions of the redistricting plan which affected those 40 counties. North Carolina submitted the 1981 plan to the Attorney General, who entered objections to both the House and Senate plans, having concluded that "the use of large multi-member districts effectively submerges cognizable concentrations of black

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<sup>5</sup> Stip. Ex. D and F, Chapters 800 and 821 Sess. Laws 1981, JA 61.

<sup>6</sup> The opinion states one district was majority black in population, JA7, referring to the second 1981 plan, enacted in October after this lawsuit was filed. Stip. Ex. L, JA 62.

population into a majority white electorate." Stip. Ex. N and O, JA63. For similar reasons, the Attorney General also objected to Article 2 Sections 3(3) and 5(3) of the North Carolina Constitution, adopted in 1967 but not submitted for preclearance until after this lawsuit was filed, which forbade the subdivision of counties in the formation of legislative districts. Stip. 22, JA 63.

Appellees filed this action in September 1981, alleging, inter alia, that the 1981 redistricting plan violated section 2 of the Voting Rights Act and the Fourteenth Amendment. Following the objections of the Attorney General under section 5, the state adopted two subsequent redistricting plans; the complaint was supplemented to challenge the final plans, which were adopted in April, 1982. Stips. 42,43; JA 67. In June 1982 Congress

amended section 2 to forbid election practices with discriminatory results, and the complaint was amended to reflect that change; thereafter the litigation focused primarily on the application of the amended section 2 to the circumstances of this case. Appellees contended that six of the multi-member districts had a discriminatory result which violated section 2, and that the boundaries of one single member district also violated that provision of the Voting Rights Act.

After an eight day trial before Judges J. Dickson Phillips, Jr., Franklin T. Dupree, Jr., and W. Earl Britt, Jr., the court unanimously upheld plaintiffs' section 2 challenge. The court enjoined elections in the challenged districts pending court approval of a districting plan which did not violate section 2.<sup>7</sup> By

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<sup>7</sup> Appellees did not challenge all multi-



subsequent orders, the court approved the State's proposed remedial districts for six of the seven challenged districts. The court entered a temporary order providing for elections in 1984 only in one district, former House District No. 8, after appellants' proposed remedial plan was denied preclearance under section 5. The remedial aspects of the litigation have not been challenged and are not before this Court.

On appeal appellants have disputed the correctness of the three judge district court's decision regarding the legality of five of the six disputed multi-member districts. Although appellants have referred to some facts from

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member districts used by the state and the district court did not rule that the use of multi-member districts is per se illegal. The district court's order leaves untouched 30 multi-member districts in the House and 13 in the Senate.

House District No. 8 and Senate District No. 2, they have made no argument in their Brief that is pertinent to the lower court's decision concerning either of these districts.<sup>8</sup> Like the United States, we assume that the correctness of the decision below regarding House District No. 8 and Senate District No. 2 is not within the scope of this appeal.

#### THE FINDINGS OF THE DISTRICT COURT

The gravamen of appellees' claim under section 2 is that minority voters in the challenged multi-member districts do not have an equal opportunity to participate effectively in the political process,

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<sup>8</sup> The Court did not note probable jurisdiction as to Question II, the question in the Jurisdictional Statement concerning these two districts, and even the Solicitor General concedes that there is no basis for appeal as to these two districts. U.S. Br. 11.

and particularly that they do not have an equal opportunity to elect candidates of their choice. Five of the challenged 1982 multi-member districts were the same as had existed under the 1971 plan, and the one that was different, House District 39, was only modified slightly. The election results in those districts are undisputed. Until 1972 no black since Reconstruction had been elected to the legislature from any of the counties in question. The election results since 1972 are set forth on the table on the opposite page. As that table indicates, prior to 1982 no more than 3 of the 32 legislators elected in any one election in the challenged districts were black; in 1981, when this action was filed, five of the seven districts were represented by all white delegations, and three of the districts still had never elected a black legisla-

# BLACK CANDIDATES ELECTED

1972-1982

District (Number of Seats)	Prior to 1972	1972	1974	1976	1978	1980	1982
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2*(2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0
<u>TOTAL (32)</u>	<u>0</u>	<u>1</u>	<u>3</u>	<u>3</u>	<u>2</u>	<u>2</u>	<u>5</u>

Source: Stip. 95  
JA 93-94

\* Senate District 2 was part of a two member district through the 1980 election; but no county in Senate District 2 was ever in a district which elected a black Senator.



tor. The black population of the challenged districts ranged from 21.8% to 39.5%. JA 21.

The district court held on the basis of this record and its examination of election results in local offices that "[t]he overall results achieved to date ... are minimal." JA 39. The court noted that, following the filing of this action, the number of successful black legislative candidates rose sharply. It concluded, however, that the results of the 1982 election were an aberration unlikely to recur again. It emphasized in particular that in a number of instances "the pendency of this very litigation worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting." JA 39 n.27.

The district court identified a number of distinct practices which put black voters at a comparative disadvantage when placed in the six majority white multi-member districts at issue. The court noted, first, that the proportion of white voters who ever voted for a black candidate was extremely low; an average of 81% of white voters did not vote for any black candidate in primary elections involving both black and white candidates, and those whites who did vote for black candidates ranked them last or next to last. JA 42. The court noted that in none of the 53 races in which blacks ran for office did a majority of whites ever vote for a black candidate, and the sole election in which 50% voted for the black candidate was one in which that candidate was running unopposed. JA. 43-48. The district court concluded that this pattern

of polarized voting put black candidates at a severe disadvantage in any race against a white opponent.

The district court also concluded that black voters were at a comparative disadvantage because the rate of registration among eligible blacks was substantially lower than among whites. This disparity further diminished the ability of black voters to make common cause with sufficient numbers of like minded voters to be able to elect candidates of their choice. The court found that these disparities in registration rates were the lingering effect of a century of virulent official hostility towards blacks who sought to register and vote. The tactics adopted for the express purpose of disenfranchising blacks included a poll tax, a literacy test with a grandfather clause, as well as a number of devices

which discouraged registration by assuring the defeat of black candidates. JA 25-26. When the use of the state literacy test ended after 1970, whites enjoyed a 60.6% to 44.6% registration advantage over blacks. Thereafter registration was kept inaccessible in many places, and a decade later the gap had narrowed only slightly, with white registration at 66.7%, and black registration at 52.7%. JA 26 and n.22.

The trial court held that the ability of black voters to elect candidates of their choice in majority white districts was further impaired by the fact that black voters were far poorer, and far more often poorly educated, than white voters. JA 28-31. Some 30% of blacks had incomes below the poverty line, compared to 10% of whites; conversely, whites were twice as likely as blacks to earn over \$20,000 a

year. Almost all blacks over 30 years old attended inferior segregated schools. JA 29. The district court concluded that this lack of income and education made it difficult for black voters to elect candidates of their choice. JA 31. n.23. The record on which the court relied included extensive testimony regarding the difficulty of raising sufficient funds in the relatively poor black community to meet the high cost of an at-large campaign, which has to reach as many as eight times as many voters as a single district campaign. (See notes 107-109, infra).

The ability of minority candidates to win white votes, the district court found, was also impaired by the common practice on the part of white candidates of urging whites to vote on racial lines. JA 33-34. The record on which the court relied



included such appeals in campaigns in 1976, 1980, 1982, and 1983. (See page 115, infra). In both 1980 and 1983 white candidates ran newspaper advertisements depicting their opponents with black leaders. In 1983 Senator Helms denounced his opponent for favoring black voter registration, and in a 1982 congressional run-off white voters were urged to go to the polls because the black candidate would be "bussing" [sic] his "block" [sic] vote. (See pp. 116-18, infra).

The district court, after an exhaustive analysis of this and other evidence, concluded that the challenged multi-member districts had the effect of submerging black voters as a voting minority in those districts, and thus affording them "less opportunity than ... other members of the

electorate to participate in the political process and to elect representatives of their choice." JA 53-54.<sup>9</sup>

#### SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act was amended in 1982 to establish a nationwide prohibition against election practices with discriminatory results. Specifically prohibited are practices that afford minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice". (Emphasis added). In assessing a claim of unequal electoral opportunity, the courts are required to consider the "totality of circumstances". A finding of unequal

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<sup>9</sup> Based on similar evidence the court made a parallel finding concerning the fracturing of the minority community in Senate District No. 2. JA 54.

opportunity is a factual finding subject to Rule 52. Anderson v. City of Bessemer City, \_\_\_ U.S. \_\_\_ (1985).

The 1982 Senate Report specified a number of specific factors the presence of which, Congress believed, would have the effect of denying equal electoral opportunity to black voters in a majority white multi-member district. The three-judge district court below, in an exhaustive and detailed opinion, carefully analyzed the evidence indicating the presence of each of those factors. In light of the totality of circumstances established by that evidence, the trial court concluded that minority voters were denied equal electoral opportunity in each of the six challenged multi-member districts. The court below expressly recognized that section 2 did not require proportional representation. JA 17.

Appellants argue here, as they did at trial, that the presence of equal electoral opportunity is conclusively established by the fact blacks won 5 out of 30 at-large seats in 1982, 14 months after the complaint was filed. Prior to 1972, however, although blacks had run, no blacks had ever been elected from any of these districts, and in the election held immediately prior to the commencement of this action only 2 blacks were elected in the challenged districts. The district court properly declined to hold that the 1982 elections represented a conclusive change in the circumstances in the districts involved, noting that in several instances blacks won because of support from whites seeking to affect the outcome of the instant litigation. JA 39 n.27.

The Solicitor General urges this Court to read into section 2 a per se rule that a section 2 claim is precluded as a matter of law in any district in which blacks ever enjoyed "proportional representation", regardless of whether that representation ended years ago, was inextricably tied to single shot voting, or occurred only after the commencement of the litigation. This per se approach is inconsistent with the "totality of circumstances" requirement of section 2, which precludes treating any single factor as conclusive. The Senate Report expressly stated that the election of black officials was not to be treated, by itself, as precluding a section 2 claim. S. Rep. No. 97-417, 29 n.115.

The district court correctly held that there was sufficiently severe polarized voting by whites to put minority

voters and candidates at an additional disadvantage in the majority white multi-member districts. On the average more than 81% of whites do not vote for black candidates when they run in primary elections. JA 42. Black candidates receiving the highest proportion of black votes ordinarily receive the smallest number of white votes. Id.

#### ARGUMENT

##### I. SECTION 2 PROVIDES MINORITY VOTERS AN EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE

Two decades ago Congress adopted the Voting Rights Act of 1965 in an attempt to end a century long exclusion of most blacks from the electoral process. In 1981 and 1982 Congress concluded that, despite substantial gains in registration since 1965, minorities still did not enjoy the same opportunity as whites to parti-



participate in the political process and to elect representatives of their choice,<sup>10</sup> and that further remedial legislation was necessary to eradicate all vestiges of discrimination from the political process.<sup>11</sup> The problems identified by Congress included not only the obvious impediments to minority participation, such as registration barriers, but also election schemes such as those at-large elections which impair exercise of the franchise and dilute the voting strength of minority citizens. Although some of these practices had been corrected in certain jurisdictions by operation of the preclearance provisions of Section 5, Congress con-

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<sup>10</sup> S. Rep. No. 97-417, 97th Cong., 2d Sess., 34 (1982) (hereinafter cited as "Senate Report").

<sup>11</sup> Senate Report 40; H.R. Rep. No. 97-227, 97th Cong., 1st Sess., 31 (1981) (hereinafter cited as "House Report").

cluded that their eradication required the adoption, in the form of an amendment to Section 2, of a national<sup>12</sup> prohibition against practices with discriminatory results.<sup>13</sup> Section 2 protects not only the right to vote, but also "the right to have the vote counted at full value without dilution or discount." Senate Report 19.

A. Legislative History of the 1982 Amendment to Section 2

The present language of section 2 was adopted by Congress as part of the Voting Rights Act Amendments of 1982. (96 Stat. 131). The 1982 amendments altered the Voting Rights Act in a number of ways,

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<sup>12</sup> House Report, 28; Senate Report 15.

<sup>13</sup> Appellants and the Solicitor General concede that the framers of the 1982 amendments established a standard of proof in vote dilution lawsuits based on discriminatory results alone. Appellants' Br. at 16; U.S. Brief II at 8, 13.

extending the pre-clearance requirements of section 5, modifying the bailout requirements of section 4, continuing until 1992 the language assistance provisions of the Act, and adding a new requirement of assistance to blind, disabled or illiterate voters. Congressional action to amend section 2 was prompted by this Court's decision in Mobile v. Bolden, 446 U.S. 55, 60-61 (1980), which held that the original language of section 2, as it was framed in 1965, forbade only election practices adopted or maintained with a discriminatory motive. Congress regarded the decision in Bolden as an erroneous interpretation of section 2,<sup>14</sup> and thus acted to amend the language to remove any such intent requirement.

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<sup>14</sup> House Rep. at 29; Senate Report at 19.

Legislative proposals to extend the Voting Rights Act in 1982 included from the outset language that would eliminate the intent requirement of Bolden and apply a totality of circumstances test to practices which merely had the effect of discriminating on the basis of race or color.<sup>15</sup> Support for such an amendment was repeatedly voiced during the extensive House hearings and much of this testimony was concerned with at-large election plans that had the effect of diluting the impact of minority votes.<sup>16</sup> On July 31 the House

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<sup>15</sup> H.R. 3112, 97th Cong., 1st Sess., § 201; H.R. 3198, 97th Cong., 1st Sess., § 2.

<sup>16</sup> The three volumes of Hearings before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 97th Cong., 1st Sess., are hereinafter cited as "House Hearings." Testimony regarding the proposed amendment to section 2 can be found at 1 House Hearings 18-19, 138, 197, 229, 365, 424-25, 454, 852; 2 House Hearings 905-07, 993-95, 1279, 1361, 1641; 3 House Hearings 1880, 1991, 2029-32, 2036-37, 2127-28, 2136, 2046-47, 2051-58.

Judiciary Committee approved a bill that extended the Voting Rights Act and included an amendment to section 2 to remove the intent requirement imposed by Bolden.<sup>17</sup> The House version included an express disclaimer to make clear that the mere lack of proportional representation would not constitute a violation of the law, and the House Report directed the courts not to focus on any one factor but

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<sup>17</sup> House Report, 48:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision [to deny or abridge] in a manner which results in a denial or abridgment of the right of any citizen to vote on account of race or color, or in contravention of the guarantees set forth in section 4(b)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

to look at all the relevant circumstances in assessing a Section 2 claim. H. Rep. at 30.

The House Report set forth the committee's reasons for disapproving any intent requirement, and described a variety of practices, particularly the use of at-large elections<sup>18</sup> and limitations on the times and places of registration,<sup>19</sup> with whose potentially discriminatory effects the Committee was particularly concerned.

On the floor of the House the proposed amendment to section 2 was the subject of considerable debate. Representative Rodino expressly called the attention of the House to this portion of the bill,<sup>20</sup> to which he and a number of other speakers

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<sup>18</sup> House Report, 17-19, 30.

<sup>19</sup> Id. 14, 16, 17, 30, 31 n.105.

<sup>20</sup> 128 Cong. Rec. H 6842 (daily ed. Oct. 2, 1981).



gave support.<sup>21</sup> Proponents of section 2 emphasized its applicability to multi-member election districts that diluted minority votes, and to burdensome registration and voting practices.<sup>22</sup> A number of speakers opposed the proposed alteration to section 2,<sup>23</sup> and Representative Bliley moved that the amendment to section 2 be deleted from the House bill. The Bliley

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<sup>21</sup> 128 Cong. Rec. H 6842 (Rep. Rodino), H 6843 (Rep. Sensenbrenner), H 6877 (Rep. Chisholm) (daily ed., Oct. 2, 1981); 128 Cong. Rec. H 7007 (Rep. Fawell)(daily ed., Oct. 5, 1981).

<sup>22</sup> 128 Cong. Rec. H 6841 (Rep. Glickman; dilution), H 6845-6 (Rep. Hyde; registration barriers), H 6847 (Rep. Bingham; voting practices, dilution); H 6850 (Rep. Washington, registration and voting barriers); H 6851 (Rep. Fish, dilution) (daily ed., Oct. 2, 1981).

<sup>23</sup> 128 Cong. Rec. H 6866 (Rep. Collins), H 6874 (Rep. Butler)(daily ed., Oct. 2, 1981); 128 Cong. Rec. H 6982-3 (Rep. Bliley), H 6984 (Rep. Butler, (Rep. McClory), H 6985 (Rep. Butler)(daily ed., Oct. 5, 1981).

amendment was defeated on a voice vote.<sup>24</sup> Following the rejection of that and other amendments the House on October 5, 1981 passed the bill by a margin of 389 to 24.<sup>25</sup>

On December 16, 1981, a Senate bill essentially identical to the House passed bill was introduced by Senator Mathias. The Senate bill, S.1992, had a total of 61 initial sponsors, far more than were necessary to assure passage. 2 Senate Hearings 4, 30, 157. The particular subcommittee to which S.1992 was referred, however, was dominated by Senators who were highly critical of the Voting Rights Act amendments. After extensive hear-

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<sup>24</sup> 128 Cong. Rec. H 6982-85 (daily ed., Oct. 5, 1981).

<sup>25</sup> Id. at H6985.

ings,<sup>26</sup> most of them devoted to section 2, the subcommittee recommended passage of S.1992, but by a margin of 3-2 voted to delete the proposed amendment to section 2. 2 Senate Hearings 10. In the full committee Senator Dole proposed language which largely restored the substance of S. 1992; included in the Dole proposal was the language of section 2 as it was ultimately adopted. The Senate Committee issued a lengthy report describing in detail the purpose and impact of the section 2 amendment. Senate Report 15-42.

The report expressed concern with two distinct types of practices with potentially discriminatory effects--first, restrictions on the times, places or

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<sup>26</sup> Id. Hearings before the Subcommittee on The Constitution of the Senate Judiciary Committee on S.53, 97th Cong., 2d Sess. (1982)(hereinafter cited as "Senate Hearings").

methods of registration or voting, the burden of which would fall most heavily on minorities,<sup>27</sup> and, second, election systems such as those multi-member districts which reduced or nullified the effectiveness of minority votes, and impeded the ability of minority voters to elect candidates of their choice.<sup>28</sup> The Senate debates leading to approval of the section 2 amendment reflected similar concerns.<sup>29</sup>

The Senate report discussed the various types of evidence that would bear on a section 2 claim, and insisted that the courts were to consider all of this evidence and that no one type of evidence

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<sup>27</sup> Senate Report, 30 n.119.

<sup>28</sup> Senate Report, 27-30.

<sup>29</sup> 128 Cong. Rec. S 6783 (daily ed. June 15, 1982)(Sen. Dodd); 128 Cong. Rec. S 7111 (daily ed. June 18, 1982) (Sen. Metzenbaum), S7113 (Sen. Bentsen), S 7116 (Sen. Weicker), S 7137 (Sen. Robert Byrd).

should be treated as conclusive.<sup>30</sup> Both the Senate Report and the subsequent debates make clear that it was the intent of Congress, in applying the amended section 2 to multi-member districts, to reestablish what it understood to be the totality of circumstances test that had been established by White v. Regester, 412 U.S. 755 (1973),<sup>31</sup> and that had been elaborated upon by the lower courts in the years between White and Bolden.<sup>32</sup> The most important and frequently cited of the courts of appeals dilution cases was Zimmer v. McKeithen,<sup>33</sup>

<sup>30</sup> Senate Report, 23, 27.

<sup>31</sup> Senate Report, 2, 27, 28, 30, 32.

<sup>32</sup> Senate Report, 16, 23, 23 n.78, 28, 30, 31, 32.

<sup>33</sup> Zimmer was described by the Senate Report as a "seminal" decision, id. at 22, and was cited 9 times in the Report. Id. at 22, 24, 24 n.86, 28 n.112, 28 n.113, 29 n.115, 29 n.116, 30, 32, 33. Senator DeConcini, one of the framers of the Dole proposal, described Zimmer as "[p]erhaps the clearest expression of the standard of

485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). The decisions applying White are an important source of guidance in a section 2 dilution case.

The legislative history of section 2 focused repeatedly on the possibly discriminatory impact of multi-member districts. Congress was specifically concerned that, if there is voting along racial lines, black voters in a majority white multi-member district would be unable to compete on an equal basis with whites for a role in electing public officials. Where that occurs, the white majority is able to determine the outcome of elections and white candidates are able

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proof in these vote dilution cases." 128 Cong. Rec. S6930 (daily ed. June 17, 1982).



to take positions without regard to the votes or preferences of black voters, rendering the act of voting for blacks an empty and ineffective ritual. The Senate Report described in detail the types of circumstances, based on the White/Zimmer factors, under which blacks in a multi-member district would be less able than whites to elect representatives of their choice. Senate Report, 28-29.

The Solicitor General, in support of his contention that a section 2 claim may be decided on the basis of a single one of the seven Senate Report factors--electoral success--regardless of the totality of the circumstances, offers an account of the legislative history of section 2 which is, in a number of respects, substantially inaccurate. First, the Solicitor asserts that, when the amended version of S. 1992 was reported to the full Judiciary

Committee, there was a "deadlock." U.S. Br. I, 8; Br. II, 8 n.12. The legislative situation on May 4, 1982 when the Dole proposal was offered, could not conceivably be characterized as a "deadlock," and was never so described by any supporter of the proposal. The entire Judiciary Committee favored reporting out a bill amending the Voting Rights Act, and fully two thirds of the Senate was committed to restoring the House results test if the Judiciary Committee failed to do so. Critics of the original S.1992 had neither the desire nor the votes to bottle up the bill in Committee,<sup>34</sup> and clearly lacked the votes to defeat the section 2 amendment on the floor of the Senate. The leading

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<sup>34</sup> 2 Senate Hearings 69 (Sen. Hatch) ("[W]hatever happens to the proposed amendment, I intend to support favorable reporting of the Voting Rights Act by this Committee")

Senate opponent of the amendment acknowledged that passage of the amendment had been foreseeable "for many months" prior to the full Committee's action.<sup>35</sup> Senator Dole commented, when he offered his proposal, that "without any change the House bill would have passed." 2 Senate Hearings 57. Both supporters<sup>36</sup> and opponents<sup>37</sup> of section 2 alike agreed that the

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<sup>35</sup> 2 Senate Hearings 69 (Sen. Hatch).

<sup>36</sup> Senate Report, 27 (section 2 "faithful to the basic intent" of the House bill); 2 Senate Hearings 60 (Sen. Dole) ("[T]he compromise retains the results standards of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test...") (Emphasis added), 61 (Sen. Dole) (language "strengthens the House-passed bill") 68 (Sen. Biden) (new language merely "clarifies" S.1992 and "does not change much"), 128 Cong. Rec. S6960-61 (daily ed. June 17, 1982) (Sen. Dole); 128 Cong. Rec. H3840 (daily ed. June 23, 1982) (Rep. Edwards).

<sup>37</sup> 2 Senate Hearings 70 (Sen. Hatch) ("The proposed compromise is not a compromise at all, in my opinion. The impact of the

language proposed by Senator Dole and ultimately adopted by Congress was intended not to water down the original House bill, but merely to spell out more explicitly the intended meaning of legislation already approved by the House.<sup>38</sup>

The Solicitor urges the Court to give little weight to the Senate Report accompanying S.1992, describing it as

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proposed compromise is not likely to be one whit different than the unamended House measure" relating to section 2; Senate Report, 95 (additional views of Sen. Hatch); 128 Cong. Rec. (daily ed. June 9, 1982) S 6515, S.6545 (Sen. Hatch); 128 Cong. Rec. (daily ed. June 10, 1982) S 6725 (Sen. East); 128 Cong. Rec. (daily ed., June 15, 1982) S.6786 (Sen. Harry Byrd).

<sup>38</sup> The compromise language was designed to reassure Senate cosponsors that the White v. Regester totality of circumstances test endorsed in the House, and espoused throughout the Senate hearings by supporters of the House passed bill, would be codified in the statute itself. 2 Senate Hearings 60; Senate Report, 27.

merely the work of a faction. U.S. Br. I, 8 n.6; U.S. Br. II, 8 n.12, 24 n.49. Nothing in the legislative history of section 2 supports the Solicitor's suggestion that this Court should depart from the long established principle that committee reports are to be treated as the most authoritative guide to congressional intent. Garcia v. United States, 105 S.Ct. 479, 483 (1984). Senator Dole, to whose position the Solicitor would give particular weight, prefaced his Additional Views with an acknowledgement that "[T]he Committee Report is an accurate statement of the intent of S.1992, as reported by the Committee."<sup>39</sup> On the floor of the Senate both supporters and opponents of

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<sup>39</sup> Senate Report 193; see also *id.* at 196 ("I express my views not to take issue with the body of the report") 199 ("I concur with the interpretation of this action in the Committee Report."), 196-98 (additional views of Sen. Grassley).

section 2 agreed that the Committee report constituted the authoritative explanation of the legislation.<sup>40</sup> Until the filing of its briefs in this case, it was the consistent contention of the Department of Justice that in interpreting section 2 "[t]he Senate Report... is entitled to greater weight than any other of the legislative history."<sup>41</sup> Only in the spring of 1985 did the Department reverse its position and assert that the Senate report was merely the view of one faction that

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<sup>40</sup> 128 Cong. Rec. S6553 (daily ed., June 9, 1982) (Sen. Kennedy); S6646-48 (daily ed. June 10, 1982) (Sen. Kennedy); S6781 (Sen. Dole) (daily ed. June 15, 1982); S6930-34 (Sen. DeConcini), S6941-44, S6967 (Sen. Mathias), S6960, 6993 (Sen. Dole), S6967 S6991-93 (Sen. Stevens), S6995 (Sen. Kennedy) (daily ed. June 17, 1982); S7091-92 (Sen. Hatch), S7095-96 (Sen. Kennedy) (daily ed., June 18, 1982).

<sup>41</sup> Post-Trial Brief for the United States of America, County Council of Sumter County, South Carolina v. United States, No. 82-0912 (D.D.C.), 31.



"cannot be taken as determinative on all counts." U.S. Br. I, p. 24, n.49. This newly formulated account of the legislative history of section 2 is clearly incorrect.

The Solicitor urges that substantial weight be given to the views of Senator Hatch,<sup>42</sup> and his legislative assistant.<sup>43</sup> In fact, however, Senator Hatch was the most intransigent congressional critic of amended section 2, and he did not as the

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<sup>42</sup> In an amicus brief in City Council of the City of Chicago v. Ketchum, No. 84-627, referred to in his brief in this case, U.S. Br. II 21 n.43, the Solicitor asserts that Senator Hatch "supported the compromise adopted by Congress." Brief for United States as Amicus, 16 n.15.

<sup>43</sup> The Solicitor cites for a supposedly authoritative summary of the origin and meaning of section 2 an article written by Stephen Markman. U.S. Br. II, 9, 10. Mr. Markman is the chief counsel of the Judiciary Subcommittee chaired by Senator Hatch, and was Senator Hatch's chief assistant in Hatch's unsuccessful opposition to the amendment to section 2.

Solicitor suggests support the Dole proposal. On the contrary, Senator Hatch urged the Judiciary Committee to reject the Dole proposal,<sup>44</sup> and was one of only four Committee members to vote against it.<sup>45</sup> Following the Committee's action, Senator Hatch appended to the Senate Report Additional Views objecting to this modified version of section 2.<sup>46</sup> On the floor of the Senate, Senator Hatch supported an unsuccessful amendment that would have struck from the bill the amendment to section 2 that had been adopted by the Committee,<sup>47</sup> and again denounced the language which eventually

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<sup>44</sup> 2 Senate Hearings 70-74.

<sup>45</sup> Id. 85-86.

<sup>46</sup> Senate Report, 94-101.

<sup>47</sup> 128 Cong. Rec. S6965 (daily ed. June 17, 1982).

became law.<sup>48</sup>

Finally, the Solicitor urges that the views of the President regarding section 2 should be given "particular weight" because the President endorsed the Dole proposal, and his "support for the compromise ensured its passage." U.S. Br. I, 8 n.6. We agree with the Solicitor General that the construction of section 2 which the Department of Justice now proposes in its amicus brief should be considered in light of the role which the Administration played in the adoption of this legislation. But that role is not, as the Solicitor asserts, one of a key sponsor of the legislation, without whose

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<sup>48</sup> Immediately prior to the final vote on the bill, Senator Hatch stated, "these amendments promise to effect a destructive transformation in the Voting Rights Act." 128 Cong. Rec. S7139 (daily ed. June 18, 1982); 128 Cong. Rec. (daily ed. June 9, 1982) S6506-21.

support the bill could not have been adopted. On the contrary, the Administration in general, and the Department of Justice in particular, were throughout the legislative process among the most consistent, adamant and outspoken opponents of the proposed amendment to section 2.

Shortly after the passage of the House bill, the Administration launched a concerted attack on the decision of the House to amend section 2. On November 6, 1981, the President released a statement denouncing the "new and untested 'effects' standard," and urging that section 2 be limited to instances of purposeful discrimination, 2 Senate Hearings 763, a position Mr. Reagan strongly reaffirmed at a press conference on December 17.<sup>49</sup> when in January 1982 the Senate commenced

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<sup>49</sup> New York Times, Dec. 18, 1981, p. B7, col. 4.

hearings on proposed amendments to the Voting Rights Act, the Attorney General appeared as the first witness to denounce section 2 as "just bad legislation," objecting in particular to any proposal to apply a results standard to any state not covered by section 5. 1 Senate Hearings 70-97. At the close of the Senate Hearings in early March the Assistant Attorney General for Civil Rights gave extensive testimony in opposition to the adoption of the totality of circumstances/ results test. Id., at 1655 et seq. Both Justice Department officials made an effort to solicit public opposition to the results test, publishing critical analyses in several national newspapers<sup>50</sup> and, in the

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<sup>50</sup> 2 Senate Hearings 770 (Assistant Attorney General Reynolds) (Washington Post), 774 (Attorney General Smith) (Op-ed article, New York Times), 775 (Attorney General Smith) (Op-ed article, Washington Post).

case of the Attorney General, issuing a warning to members of the United Jewish Appeal that adoption of a results test would lead to court ordered racial quotas.<sup>51</sup> The White House did not endorse the Dole proposal until after it had the support of 13 of the 18 members of the Judiciary Committee and Senator Dole had warned publicly that he had the votes necessary to override any veto.<sup>52</sup>

Having failed to persuade Congress to reject a results standard in section 2, the Department of Justice now seeks to persuade this court to adopt an interpretation of section 2 that would severely limit the scope of that provision. Under these unusual circumstances the Depart-

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<sup>51</sup> Id. at 780.

<sup>52</sup> Los Angeles Times, May 4, 1982, p. 1; Wall Street Journal, May 4, 1982, p. 8; 2 Senate Hearings 58.



ment's views do not appear to warrant the weight that might ordinarily be appropriate. We believe that greater deference should be given to the views expressed in an amicus brief in this case by Senator Dole and the other principal cosponsors of section 2.

B. Equal Electoral Opportunity is the Statutory Standard

Section 2 provides that a claim of unlawful vote dilution is established if, "based on the totality of circumstances," members of a racial minority "have less opportunity than other members to participate in the political process and to elect representatives of their choice."<sup>53</sup> In the instant case the district court concluded that minority voters lacked such an equal opportunity. JA 53-54.

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<sup>53</sup> 42 U.S.C. § 1973, Section 2(b) is set forth in the opinion below, JA 13.

Both appellants and the Solicitor General suggest, however, that section 2 is limited to those extreme cases in which the effect of an at-large election is to render virtually impossible the election of public officials, black or otherwise, favored by minority voters. Thus appellants assert that section 2 forbids use of a multi-member district when it "effectively locks the racial minority out of the political forum," A. Br. 44, or "shut[s] racial minorities out of the electoral process" Id. at 23. The Solicitor invites the Court to hold that section 2 applies only where minority candidates are "effectively shut out of the political process". U.S. Br. 11 27; see also id. at 11. On this view, the election of even a single black candidate would be fatal to a section 2 claim.

The requirements of section 2, however, are not met by an election scheme which merely accords to minorities some minimal opportunity to participate in the political process. Section 2 requires that "the political processes leading to nomination or election" be, not merely open to minority voters and candidates, but "equally open". (Emphasis added). The prohibition of section 2 is not limited to those systems which provide minorities with no access whatever to the political process, but extends to systems which afford minorities "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added).

This emphasis on equality of opportunity was reiterated throughout the legislative history of section 2. The

Senate report insisted repeatedly that section 2 required equality of political opportunity.<sup>54</sup> Senator Dole, in his

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<sup>54</sup> S. Rep. 97-417, p. 16 ("equal chance to participate in the electoral process"; "equal access to the electoral process") 20 ("equal access to the political process"; at-large elections invalid if they give minorities "less opportunity than ... other residents to participate in the political processes and to elect legislators of their choice"), 21 (plaintiffs must prove they "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice"), 27 (denial of "equal access to the political process"), 28 (minority voters to have "the same opportunity to participate in the political process as other citizens enjoy"; minority voters entitled to "an equal opportunity to participate in the political processes and to elect candidates of their choice"), 30 ("denial of equal access to any phase of the electoral process for minority voters"; standard is whether a challenged practice "operated to deny the minority plaintiff an equal opportunity to participate and elect candidates of their choice"; process must be "equally open to participation by the group in question"), 31 (remedy should assure "equal opportunity for minority citizens to participate and to elect candidates of their choice").

Additional Views, endorsed the committee report, and reiterated that under the language of section 2 minority voters were to be given "the same opportunity as others to participate in the political process and to elect the candidates of their choice".<sup>55</sup> Senator Dole and others repeatedly made this point on the floor of the Senate.<sup>56</sup>

The standard announced in White v. Regester was clearly one of equal opportunity, prohibiting at-large elections which afford minority voters "less opportunity than ... other residents in

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<sup>55</sup> Id. at 194 (emphasis omitted); See also Id. at 193 ("Citizens of all races are entitled to have an equal chance of electing candidates of their choice...."), 194 ("equal access to the political process").

<sup>56</sup> 128 Cong. Rec. S6559, S6560 (Sen. Kennedy) (daily ed. June 9, 1982); daily ed. June 17, 1982); 128 Cong. Rec. S7119-20 (Sen. Dole), (daily ed. June 18, 1982).

the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765. (Emphasis added). The Solicitor General asserts that during the Senate hearings three supporters of section 2 described it as "merely a means of ensuring that minorities were not effectively 'shut out' of the electoral process". U.S. Br. II, 11. This is not an accurate description of the testimony cited by the Solicitor.<sup>57</sup>

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<sup>57</sup> David Walbert stated that minority voters had had "no chance" to win elections in their earlier successful dilution cases, 1 Senate Hearings 626, but also noted that the standard under White was whether minority voters had an "equal opportunity" to do so. Id. Senator Kennedy stated that under section 2 minorities could not be "effectively shut out of a fair opportunity to participate in the election". Id. at 223. Clearly a "fair" opportunity is more than any minimal opportunity. Armand Derfner did use the words "shut out", but not, as the Solicitor does, followed by the clause "of the political process". Id. at 810. More importantly, both in his oral statement (id. at 796, , 800) and his prepared statement (id. at 811, 818) Mr. Derfner



Even if it were, the remarks of three witnesses would carry no weight where they conflict with the express language of the bill, the committee report, and the consistent statements of supporters. Ernst and Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976).

C. The Election of Some Minority Candidates Does Not Conclusively Establish The Existence Of Equal Political Opportunity

The central argument advanced by the Solicitor General and the appellants is that the election of a black candidate in a multi-member district conclusively establishes the absence of a section 2 violation. The Solicitor asserts, U.S. Br. I 13-14, that it is not sufficient that there is underrepresentation now, or

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expressly endorsed the equal opportunity standard.

that there was underrepresentation for a century prior to the filing of the action; on the Solicitor's view there must at all times have been underrepresentation. Thus the Solicitor insists there is no vote dilution in Senate District 32, which has not elected a black since 1978, and that there can be no vote dilution in House District 36, because, of eight representatives, a single black, the first this century, was elected there in 1982 after this litigation was filed.

This interpretation of section 2 is plainly inconsistent with the language and legislative history of the statute. Section 2(b) directs the courts to consider "the totality of circumstances," an admonition which necessarily precludes giving conclusive weight to any single circumstance.<sup>58</sup> The "totality of circum-

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<sup>58</sup> The Solicitor's argument also flies in the

stances" standard was taken from White v. Regester, which Congress intended to codify in section 2. The House and Senate reports both emphasize the importance of considering the totality of circumstances, rather than focusing on only one or two portions of the record. Senate Report 27, 34-35; House Report, 30. The Senate Report sets out a number of "[t]ypical" factors to be considered in a dilution case,<sup>59</sup> of which "the extent to which members of the minority group have been

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face of the language of section 2 which disavows any intent to establish proportional representation. On the Solicitor's view, even if there is in fact a denial of equal opportunity, blacks cannot prevail in a section 2 action if they have, or have ever had, proportional representation. Thus proportional representation, spurned by Congress as a measure of liability, would be resurrected by the Solicitor General as a type of affirmative defense.

<sup>59</sup> The factors are set out in the opinion below. JA 15.

elected to public office in the jurisdiction" is only one, and admonishes "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Senate Report 28-29.<sup>60</sup> Senator Dole, in his additional views accompanying the committee report, makes this plain. "The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive." Id. at 194. (Emphasis added).<sup>61</sup>

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<sup>60</sup> See also Senate Report 23 ("not every one of the factors needs to be proved in order to obtain relief").

<sup>61</sup> 128 Cong. Rec. S6961 (daily ed. June 17, 1982) (Sen. Dole); 128 Cong. Rec. S7119 (daily ed. June 18, 1982) (Sen. Dole).

The arguments of appellants and the Solicitor General that any minority electoral success should foreclose a section 2 claim were expressly addressed and rejected by Congress. The Senate Report explains, "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote.'" Id. at 29 n.115. Both White v. Regester and its progeny, as Congress well knew, had repeatedly disapproved the contention now advanced by appellants and the Solicitor.<sup>62</sup> In White itself, as the Senate Report noted, a total of two blacks and five hispanics had

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<sup>62</sup> "The results test, codified by the committee bill, is a well-established one, familiar to the courts. It has a reliable and reassuring track record, which completely belies claims that it would make proportional representation the standard for avoiding a violation." (Emphasis added). 128 Cong. Rec. S6559 (Sen. Kennedy) (daily ed. June 9, 1982).

been elected from the two multi-member districts invalidated in that case. Senate Report 22. Zimmer v. McKeithen, in a passage quoted by the Senate Report, had refused to treat "a minority candidate's success at the polls [a]s conclusive." Id. at 29 n.115. The decision in Zimmer is particularly important because in that case the court ruled for the plaintiffs despite the fact that blacks had won two-thirds of the seats in the most recent at-large election. 485 F.2d at 1314. The dissenters in Zimmer unsuccessfully made the same argument now advanced by appellants and the Solicitor, insisting "the election of three black candidates ... pretty well explodes any notion that black voting strength has been cancelled or minimized". 485 F.2d at 1310 (Coleman, J., dissenting). A number of other lower court cases implementing White had



also refused to attach conclusive weight to the election of one or more minority candidates.<sup>63</sup>

There are, as Congress anticipated, a variety of circumstances under which the election of one or more minority candidates might occur despite an absence of

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<sup>63</sup> Kirksey v. Board of Supervisors, 554 F.2d 139, 149 n.21 (5th Cir. 1977); Cross v. Baxter, 604 F.2d 875, 880 n.7, 885 (5th Cir. 1979); United States v. Board of Supervisors of Forrest County, 571 F.2d 951, 956 (5th Cir. 1978); Wallace v. House, 515 F.2d 619, 623 n.2 (5th Cir. 1975). See also Senator Hollings' comments on the district court decision in McCain v. Lybrand, No. 74-281 (D.S.C. April 17, 1980), finding a voting rights violation despite some black participation on the school board and other bodies. 128 Cong. Rec. S6865-66 (daily ed. June 16, 1975). In post-1982 section 2 cases, the courts have also rejected the contention that the statute only applies where minorities are completely shut out. See e.g., United States v. Marengo County Commission, 731 F.2d 1546, 1571-72 (11th Cir. 1984), cert. denied, 105 S.Ct. 375 (1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1023 (5th Cir. 1984); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

the equal electoral opportunity required by the statute. A minority candidate might simply be unopposed in a primary or general election, or be seeking election in a race in which there were fewer white candidates than there were positions to be filled.<sup>64</sup> White officials or political

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<sup>64</sup> The Solicitor General suggests that the very fact that a black candidate is unopposed conclusively demonstrates that the candidate or his or her supporters were simply unbeatable. U.S. Br. II, 22 n.46, 33. But the number of white potential candidates who choose to enter a particular at-large race may well be the result of personal or political considerations entirely unrelated to the circumstances of any minority candidate. Evidence that white potential candidates were deterred by the perceived strength of a minority candidate might be relevant rebuttal evidence in a section 2 action, but here appellants offered no such evidence to explain the absence of a sufficient number of white candidates to contest all the at-large seats. Moreover, in other cases, the Department of Justice has urged courts to find a violation of section 2 notwithstanding the election of a black candidate running unopposed. See United States v. Marengo County Commission (S.D. Ala.) No. 78-474H, Proposed Findings of Fact and Conclusions of Law for the United States,

leaders, concerned about a pending or threatened section 2 action, might engineer the election of one or more minority candidates for the purpose of preventing the imposition of single member districts.<sup>65</sup> The mere fact that minority candidates were elected would not mean that those successful candidates were the representatives preferred by minority

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filed June 21, 1985, p. 8.

<sup>65</sup> Zimmer v. McKeithen, 485 F.2d at 1307:

"Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations--namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district."

voters. The successful minority candidates might have been the choice, as in White v. Regester, 412 U.S. at 755; Senate Report, 22, of a white political organization, or might have been able to win and retain office only by siding with the white community on, or avoiding entirely, those issues about which whites and non-whites disagreed. Even where minority voters and candidates face severe inequality in opportunity, there will occasionally be minority candidates able to overcome those obstacles because of exceptional ability or "a 'stroke of luck' which is not likely to be repeated...."<sup>66</sup>

The election of a black candidate may also be the result of "single shooting", which deprives minority voters of any vote at all in every at-large election but one.

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<sup>66</sup> Wallace v. House, 515 F.2d 619, 623 n.2 (5th Cir. 1975).

In multi-member elections for the North Carolina General Assembly where there are no numbered seats, voters may typically vote for as many candidates as there are vacancies. Votes which they cast for their second or third favorite candidates, however, may result in the victory of that candidate over the voters' first choice.<sup>67</sup> Where voting is along racial lines, the only way minority voters may have to give preferred candidates a serious chance of victory is to cast only one of their ballots, or "single shoot," and relinquish any opportunity at all to influence the

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<sup>67</sup> This is especially true in North Carolina where, because of the multiseat electoral system, a candidate may need votes from more than 50% of the voters to win. For example, in the Forsyth Senate primary in 1980, there were 3 candidates for 2 seats. If the votes were spread evenly and all voters voted a full slate, each candidate would get votes from 2/3 or 67% of the voters. In such circumstances it would take votes from more than 67% of the voters to win. N.C.G.S. 163.111(a)(2).

election of the other at-large officials.<sup>68</sup>

Where single shot voting is necessary to elect a black candidate, black voters are forced to limit their franchise in order to compete at all in the political process. This is the functional equivalent of a rule which permitted white voters to cast five ballots for five at-large seats, but required black voters to abnegate four of those ballots in order to cast one ballot for a black candidate.

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<sup>68</sup> For example, in 1978, in Durham County, 99% of the black voters voted for no one but the black candidate, who won. JA Ex. Vol. I Ex. 8. In Wake County in 1978, approximately 80% of the black voters supported the black candidate, but because not enough of them single shot voted the black candidate lost. The next year, after substantially more black voters concentrated their votes on the black candidate, forfeiting their right to vote a full slate, the first black was elected. Similarly in Forsyth County when black voters voted a full slate in 1980, the black candidate lost. It was only after many black voters declined to vote for any white candidates that black candidates were elected in 1982. Id.



Black voters may have had some opportunity to elect one representative of their choice, but they had no opportunity whatever to elect or influence the election of any of the other representatives.<sup>69</sup> Even where the election of one or more blacks suggests the possible existence of some electoral opportunities for minorities, the issue of whether those opportunities are the same as the oppor-

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<sup>69</sup> There is no support for appellants' claim that white candidates need black support to win at-large. Black votes were not important for successful white candidates. Because of the necessity of single shot voting, in most instances black voters were unable to affect the outcome of other than the races of the few blacks who won. For example, white candidates in Durham were successful with only 5% of the votes cast by blacks in 1978 and 1982; in Forsyth, white candidates in 1980 who received less than 2% of the black vote were successful, and in Mecklenburg in 1982, the leading white senate candidate won the general election although only 5% of black voters voted for him. Id. See, JA 244.

tunities afforded to whites can only be resolved by a distinctly local appraisal of all other relevant evidence.

These complex possibilities make clear the wisdom of Congress in requiring that a court hearing a section 2 claim must consider "the totality of circumstances," rather than only considering the extent to which minority voters have, or have not, been underrepresented in one or more years. Congress neither deemed conclusive the election of minority candidates, nor directed that such victories be ignored.<sup>70</sup> The language and legislative history of section 2 recognize the potential significance of the election

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<sup>70</sup> As in other areas of civil rights, the results test in section 2 no more requires proof that no blacks ever win elections than the effect rule in Title VII requires that no blacks can ever pass a particular non-job related test. See Connecticut v. Teal, 457 U.S. 440 (1982).

of minority candidates, but require that the significance of any such elections be carefully assessed from a local vantage in order to determine what light, if any, those events shed, in the context of all relevant circumstances, on the section 2 claim at issue.

II. THE DISTRICT COURT REQUIRED NEITHER  
PROPORTIONAL REPRESENTATION NOR  
GUARANTEED MINORITY POLITICAL SUCCESS

Appellants flatly assert that the district court in this case interpreted section 2 to "creat[e] an affirmative entitlement to proportional representation". A. Br. 19. The district court opinion, however, simply contains no such construction of section 2. On the contrary, the lower court expressly held that section 2 did not require proportional representation, emphasizing that "the fact that blacks have not been

elected under a challenged districting plan in numbers proportional to their percentage of the population" "does not alone establish that vote dilution has resulted." JA 17.

Appellants suggest in the alternative that the district court "apparently" equated the equal opportunity required by section 2 with "guaranteed electoral success," A. Br. 14, 15, 35. Again, however, no such rule of law is espoused in any portion of the opinion below. The ultimate factual findings of the district court are not cast in terms of the lack of any such guarantee; rather the trial court concluded that section 2 had been violated because minority voters had "less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." JA 54.

The Solicitor argues that, because the facts as he personally views them did not violate section 2, the three trial judges must have been applying an incorrect, albeit unspoken, interpretation of section 2. Thus the Solicitor asserts that since the trial court

could not reasonably have found a violation under the proper ... standard, [it] rather must implicitly have sought to guarantee continued minority electoral success. (U.S. Br. II, 7) (Emphasis added).<sup>71</sup>

But the district court, whether or not the Solicitor thinks it reasonable, found as a matter of fact that blacks do not enjoy the same opportunity as whites to participate in the political process. The

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<sup>71</sup> See also U.S. Br. I, 12 (in light of Solicitor's view of the facts, misinterpretation of the law is "the only explanation for the district court's conclusion", 18 n.19 (district court "in effect" interpreted section 2 as imposing a "proportional representation plus" standard)).

Solicitor's argument is simply an attempt to transform a disagreement about the relevant facts, a disagreement in which the trial court's findings would be subject to Rule 52, into an issue of law. If the trial court's factual findings are clearly erroneous they can, of course, be reversed on appeal. But if both those factual findings and the legal principles announced by the district court are sound, the resulting judgment cannot be overturned by hypothesizing that the three trial judges here were purposefully applying legal principles different than those actually set forth in their opinion.

Although the trial court expressly construed section 2 not to require proportional representation, appellants suggest, A. Br. 19-20, that the lower court implicitly announced that it was



applying just such a requirement in the following passage:

The essence of racial vote dilution in the White v. Regester sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively, see United Jewish Organizations v. Carey, 403 U.S. 144, 166 n.24 (1977), give it in a voting constituency not racially polarized in its voting behavior. See Nevett v. Sides, 571 F.2d 209, 223 & n.16 (5th Cir. 1978). JA 16.

This passage, which is immediately preceded by discussion of the totality of circumstances test, and followed by an exposition of the statutory disclaimer prohibiting proportional representation, asserts only that, in the absence of vote dilution, black voters would possess the

ability to influence the policies of their elected officials, not, as appellants claim, that black voters would be certain to elect black officials "in proportion to their presence in the population". A. Br. 20. The portion of Nevett v. Sides referred to by the district court discusses the extent to which black voters, in the absence of polarized voting, would have the political power to assure that their interests were protected by white officials.<sup>72</sup>

Appellees in this case did not seek, and the trial court did not require,<sup>73</sup> any

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<sup>72</sup> Nevett v. Sides, 571 F.2d at 223 n.16.

<sup>73</sup> Indeed appellants proposed the plan now in effect for all the districts at issue, which was adopted by the court without modification. See supra, at 5-6.

guarantee of proportional representation, and proportional representation did not result from the decision below.<sup>74</sup>

III. THE DISTRICT COURT APPLIED THE CORRECT STANDARDS IN EVALUATING THE EVIDENCE OF POLARIZED VOTING

In determining whether a method of election violates section 2, a trial court must evaluate "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. at 29.<sup>75</sup> The court below evaluated the

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<sup>74</sup> Prior to this litigation only 4 of the 170 members of the North Carolina legislature were black; today there are still only 16 black members, less than 10%, a far smaller proportion than the 22.4% of the population who are black. Whites, who are 75.8% of the state population, still hold more than 90% of the seats in the legislature.

<sup>75</sup> Racial bloc voting is significant in a section 2 case because, in the context of an electoral structure wherein the number of votes needed for election exceeds the number of black voters, it substantially diminishes the opportunity for black voters to elect candidates of their

lay and expert testimony on this question and found "that within all the challenged districts racially polarized voting exists in a persistent and severe degree." JA 40. Appellants argue that this finding is erroneous as a matter of law.

Appellants, A. Br. 36, and the Solicitor, U.S. Br. II 39, contend that the court erroneously defined racially polarized voting as occurring "whenever less than a majority of white voters vote for the black candidate." But the district court, guided by the Senate report and in accordance with the experts for appellants and appellees, in fact defined racially polarized voting as the

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choice, and it allows white candidates to ignore the interests of the black community and still get elected. See United States v. Carolene Products Co., 304 U.S. 144, 152-3 n.4 (1938); Major v. Treen, 574 F. Supp. 325, 339 (E. D. La. 1983) (three judge court).

extent to which black and white voters vote differently from each other in relation to the race of the candidates.<sup>76</sup>

The court focused not only on the existence but the degree of polarized voting. As articulated by the court, the relevant question is whether a substantial enough number of white citizens do not vote for black candidates, so that the polarization operates, under the election method in question, to diminish the opportunity of black citizens to elect candidates of their choice. JA 16-17, 43.

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<sup>76</sup> Senate Report, 29; JA 40, n.29; JA 123. T. 1404. See also City of Rome v. United States, 446 U.S. 156, 183-187 (1980), affirming 472 F. Supp. 221, 226 (D.D.C. 1979) ("Racial bloc voting is a situation where, when candidates of different races are running for the same office, the voters will by and large vote for the candidate of their own race.") Accord, 128 Cong. Rec. S7120 (Sen. Dole)(daily ed. June 18, 1982).

This inquiry is plainly consistent with the statutory language of Section 2.

A. Summary of the District Court's Findings

The District Court examined a number of factors in determining that voting was severely racially polarized.

1. The court examined the percentage<sup>77</sup> of white and black voters who voted for the black candidates in each of 53 primaries and general elections in which a black candidate had run during the three election years prior to the trial. JA 43-48. The court found that, on the average, 81.7% of white voters did not

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<sup>77</sup> Appellants conceded that the method used to assess the extent of racially polarized voting is standard in the literature and that the statistical analysis performed by appellees' expert was done accurately, JA 131-2, 281.



vote for any black candidate in the primary elections, and "approximately two thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one." JA 42.

2. The district court determined how often the candidates of choice of white voters and of black voters were different. Although, in primaries, black voters ranked black candidates first or first and second, white voters almost always ranked them last or next to the last. JA Ex. Vol. I Ex. 5-7. In general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in those latter, "white voters consistently ranked black

candidates last among Democrats if not last or next to last among all candidates." JA 42. If white voters as a group are selecting different candidates than black voters as a group, assuming black voters are in a minority, the polarization diminishes the chances that the black voters' candidate will be elected. JA 132-136. In fact, the court found that in all but two of the election contests, the black candidates who were the choice of black voters were ranked last or near last such that they lost among white voters. JA 42, n.31.<sup>78</sup>

3. The court considered statistical analyses of the degree of correlation between the race of voters and the race of candidates whom they supported. The race of the voter and the race of a candidate

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<sup>78</sup> In describing this analysis the court used the term "substantively significant". JA 41-2.

were very closely correlated.<sup>79</sup> The court found that the probability of such correlations appearing by chance was less than 1 in 100,000. JA 41 and n.30. Appellants' expert agreed with this determination. JA 281.

B. The Extent of Racial Polarization was Significant, Even Where Some Blacks Won

In addition to their mischaracterization of the court's analysis, appellants propose a novel standard for assessing the degree of polarized voting. Appellants contend that racial polarization of voting has no legal significance unless it

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<sup>79</sup> Expert witnesses for appellants and appellees agreed that the correlation coefficient is the standard measure of whether black and white voters vote differently from each other. JA 129, 281. Correlations above an absolute value of .5 are relatively rare. The correlations in this case had absolute values between .7 and .98, with most above .9. JA 41, n.30.

always causes blacks to lose.<sup>80</sup> A. Br. 35, 40. Under appellants' standard, a theory not adopted in any vote dilution case they cite, any minority electoral success precludes a finding of racially polarized voting and bars a section 2 violation, a result clearly contrary to the intent of Congress. See S. Rep. at 29, n.115 and pp. 50-64, supra. Appellees know of no

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<sup>80</sup> The Solicitor General does not adopt appellants' proposed standard, but articulates the inquiry as whether "the impact of racial bloc voting in combination with the challenged procedure -- deprives black voters of equal access to the electoral process..." U.S. Br. 31-32. Assuming that the Solicitor General includes with "equal access to the electoral process", as the statutory language of section 2 does, an equal opportunity to elect candidates of black voters' choice, the Solicitor General does not disagree with the district court's conception of the question. The Solicitor General simply disagrees with the district court's finding of fact as to its answer.

court which has adopted appellants' proposed standard in a section 2 case.

Other courts have found polarized voting sufficient to support a violation of section 2, despite a finding of some electoral success. In McMillan v. Escambia County, 748 F.2d 1037, 1043, 1045 (11th Cir. 1984) (McMillan II), the court found racially polarized voting and a violation of section 2 despite some black electoral success, based on a finding that "a consistent majority of the whites who vote will consistently vote for the black's opponent." See also Major v. Treen, 574 F. Supp. at 339.

In fact, in 65% of the election contests analyzed here in which the black candidate received substantial black support, the black candidate did lose because of racial polarization in voting.

That is, he lost, even though he was the top choice of black voters, because of the paucity of support among white voters. Appellants' statement that "two thirds of all black candidates have been successful", A. Br. 45, is misleading since it only counts black candidates who made it to the general elections and ignores the many black candidates who lost in the Democratic primaries. Furthermore, of white Democrats who made it to the general election, 100% were successful in 1982, and about 90% were successful in earlier election years. JA Ex. Vol. I Ex. 13.

Appellants rely on Rogers v. Lodge, 458 U.S. 613 (1982) and two post-Mobile lower court cases, all involving claims of discriminatory intent under the Fourteenth Amendment. We do not read the cited cases to hold that racial polarization is legally significant only if it uniformly



causes electoral defeat.<sup>81</sup> But this Court need not consider, in the context of this case, whether appellants' bold assertion is correct. Assuming arguendo that proof of absolute exclusion may be necessary to raise an inference of discriminatory intent, it is not necessary to show that black citizens have "less opportunity" than do whites to elect candidates of their choice in violation of the results standard of section 2.

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<sup>81</sup> The lower court in Rogers v. Lodge found racial bloc voting based upon an analysis that included an election in which a black had won a city council seat. Lodge v. Buxton, Civ. No. 176-55 (S.D. Ga. Oct. 26, 1978) slip. op. at 7-8. In NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982), the finding of unconstitutional vote dilution was upheld despite the election of one black candidate to the school board, a level of electoral success similar to that present here in House District 21 and House District 36.

C. Appellees Were not Required to Prove that White Voters' Failure to Vote for Black Candidates was Racially Motivated.

Appellants contend that proof that white voters rarely or never vote for minority candidates does not establish the presence of polarized voting. Rather, they urge, a plaintiff must adduce probative evidence of the motives of the individual white voters at issue, and must establish that those voters cast their ballots with a conscious intention to discriminate against minority candidates because of the race of those candidates.<sup>82</sup> A. Br. 42-44.

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<sup>82</sup> Appellants argue in particular that proof of motives of the electorate must take the form of a multivariate analysis. (App.Br. 43-44). No such multivariate analysis was presented in White v. Regester or any of the other dilution cases to which Congress referred in adopting section 2. Although appellants now urge that evidence of a multivariate analysis is essential as a matter of law, no such contention was ever made to the district court.

This proposed definition of polarized voting would incorporate into a dilution claim precisely the intent requirement which Congress overwhelmingly voted to remove from section 2. The legislative history of section 2 is replete with unqualified statements that no proof of discriminatory intent would be required in a section 2 case, and Congress' reasons for objecting to the intent requirement in Bolden are equally applicable to the intent requirement now proposed by appellants.<sup>83</sup>

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<sup>83</sup> The reasons set out in the Senate Report for rejecting any intent requirement were reiterated by individual members of Congress. Senate Report 193 (additional views of Sen. Dole); 128 Cong. Rec. (daily ed. June 9, 1982) S6560-61 (Sen. Kennedy); 128 Cong. Rec. (daily ed. June 15, 1982) S6779 (Sen. Specter); 128 Cong. Rec. (daily ed. June 17, 1982) S6931 (Sen. DeConcini); S6943 (Sen. Mathias); S6959 (Sen. Mathias); 128 Cong. Rec. (daily ed. June 18, 1982) S7109 (Sen. Tsongas); S7112 (Sen. Riegle); S7138 (Sen. Robert Byrd).

Congress opposed any intent requirement, first, because it believed that the very litigation of such issues would inevitably stir up racial animosities, insisting that inquiries into racial motives "can only be divisive." Senate Report 36. Congress contemplated that under the section 2 results test the courts would not be required to "brand individuals as racist." Id. The divisive effect of litigation would be infinitely greater if a plaintiff were required to prove and a federal court were to hold that the entire white citizenry of a community had acted with racial motives.

Second, Congress rejected the intent test because it created "an inordinately difficult burden for plaintiffs in most cases." (S.Rep. 36) The Senate Committee expressed particular doubts about whether

it might be legally impossible to inquire into the motives of individual voters, id., and referred to a then recent Fifth Circuit decision holding that the First Amendment forbade any judicial inquiry into why a specific voter had voted in a particular way.<sup>84</sup> Congress thought it unreasonable to require plaintiffs to establish the motives of local officials; establishing the motives of thousands of white voters, none of whom keep any records of why they voted, and all of whom are constitutionally immune from any inquiry into their actions or motivations in casting their ballots,<sup>85</sup> would clearly

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<sup>84</sup> Id. 36 n.135, citing Kirksey v. City of Jackson, 699 F.2d 317 (5th Cir. 1982), clarifying Kirksey v. City of Jackson, 663 F.2d 659 (5th Cir. 1981).

<sup>85</sup> See also Anderson v. Mills, 664 F.2d 600, 608-9 (6th Cir. 1981); South Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295 (9th Cir. 1970); United States v. Executive Committee of Democratic Party of Greene County, Ala.,

be an infinitely more difficult task.<sup>86</sup>

Counsel for appellants contend that the plaintiffs in a section 2 action should be required to establish the motives of white voters by means of statistics, but at trial appellants' statistician conceded it would be impossible to do so.<sup>87</sup>

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254 F. Supp. 543, 546 (S.D. Ala. 1966).

<sup>86</sup> The courts have consistently entered findings of racially polarized voting without imposing the additional burdens now urged by appellants. See Mississippi Republican Executive Committee v. Brooks, U.S. , 105 S.Ct. 416 (1984) (summary affirmance of district court using correlation test). See also Rogers v. Lodge, supra, 458 U.S. at 623; Marengo County, supra, 731 F.2d at 1567 n.34; Perkins v. City of West Helena, 675 F.2d 201, 213 (8th Cir. 1982), aff'd mem. 459 U.S. 801 (1982); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981), aff'd 459 U.S. 159 (1982).

<sup>87</sup> Appellants' expert testified that many of the variables which he considers important, such as a candidate's skills or positions on the issues, are not quantifiable. He did not suggest how such an analysis could be performed, and he



Third, Congress regarded the presence or absence of a discriminatory motive as largely irrelevant to the problem with which section 2 was concerned. Senate Report 36. The motives of white voters are equally beside the point. The central issue in a dilution case is whether, not why, minority voters lack an equal opportunity to elect candidates of their choice.

In appellant's view, polarized voting occurs only when whites vote against black candidates because of their race, but not when whites consistently vote against black candidates because those candidates

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conceded he had never performed one. T. 1420, 1460, JA 283. Even McCleskey v. Zant, 580 F.Supp. 338 (N.D.Ga. 1984), aff'd, 753 F.2d 877 (5th Cir. 1985), cert. pending, No. 84-\_\_\_\_\_, on which appellants rely, holds that such regression analyses are incapable of demonstrating racial intent where, as here, "qualitative" nonquantifiable differences are involved. 580 F. Supp. at 372.

are not able to purchase expensive media campaigns or obtain endorsements from local newspapers. The reasons appellants present as a legitimate basis for whites not voting for black candidates are almost invariably race related. In the instant case, for example, the inability of black candidates to raise large campaign contributions had its roots in the discrimination that has impoverished most of the black community. An election system in which black candidates cannot win because their supporters are poor, or because local newspapers only endorse whites, or because of white hostility to any candidate favoring enforcement of civil rights laws, is not a system in which blacks enjoy an equal opportunity to participate in the political process or elect candidates of their choice.<sup>88</sup>

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<sup>88</sup> Moreover, to require a district court to

D. The District Court's Finding of the Extent of Racially Polarized Voting is not Clearly Erroneous.

Based on the analysis summarized in Part III A, supra, the trial judges found "that in each of the challenged districts racial polarization in voting exists to a substantial or severe degree, and that in each district it presently operates to minimize the voting strength of black voters." JA 48.

The Solicitor contends that the district court ignored possible variations in the extent of polarized voting, asserting

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determine which ostensible reasons are legitimate and which are race related would be exactly the type of subjective, motivational analysis Congress sought to avoid. If such an analysis were relevant, even the Solicitor General agrees that it is not necessary in order to establish a prima facie case, but it is the defendants' burden to prove it on rebuttal. U.S. Br. 30, n.57. Accord, Jones v. Lubbock, 730 F.2d 233, 236 (5th Cir. 1984) (Higginbotham concurring). No such evidence was offered here.

the district court adopted a definition of racial bloc voting under which racial polarization is "substantively significant" or "severe" whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election. U.S. Br. I, 29.

The Solicitor argues that under this definition elections in which only 49% of whites voted for a black would be held to be "severely racially polarized". U.S. Br. 29. (Emphasis in original). This argument rests on a misrepresentation of the language of the opinion below. The quoted reference to differences in the preferences of black and white voters appears on page JA 41 of the opinion, where the district court correctly notes the presence of such differences in this case. The term "severe" does not appear in that passage at all, but is used on the

next page in a separate paragraph to describe elections in which 81.7% of white voters declined to vote for any black candidate. JA 42. The opinion of the district court clearly distinguishes the presence of any differences between black and white voters from a case in which whites overwhelmingly opposed the candidate preferred by black voters, and equally clearly characterizes only the latter as "severe."

The primary evidentiary issue regarding polarized voting that must be resolved in a section 2 dilution case is whether the degree of polarization was sufficiently severe as to materially impair the ability of minority voters to elect candidates of their choice.<sup>89</sup> In

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<sup>89</sup> While appellants do not challenge the method appellees' expert used to analyze the election returns in general, JA 131-2, 281, appellants claim that appellees' regression analysis is flawed by what

concluding that such impairment had been shown, the court relied on the extensive fact findings noted above, including the fact on average 81.7% of white voters do not vote for any black candidate in a primary election. The polarization was most severe in House District 8, where an average of 92.7% of white voters do not vote for any black candidate in a primary, JA 47-48; the district court correctly

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they labeled the "ecological fallacy." They assert that instead of using turnout figures, appellees' expert used voter registration figures. A. Br. 41. Not only was this argument made to the district court and rejected, JA 40, n.29, but also it is not accurate. Appellees' expert, Dr. Grofman, did have turnout figures for each precinct, and he used a regression analysis to calculate the turnout figures by race. Px 12 at pp. 3-8. In fact, appellants' expert admitted that he did not know what method Dr. Grofman used to calculate turnout, JA 279-80, and he, therefore, could not express an opinion about the accuracy of the method.



noted that in that district it was mathematically impossible for a black candidate ever to be elected. JA 48.

In the other districts, the degree of polarization was sufficiently severe to be a substantial impediment, although not necessarily an absolute bar, to the election of minority candidates. The average portion of white voters willing to support a black candidate in a primary was 18%. The proportion of voters that was white ranged from 70.5% to 84.9%. JA 21. In each of the disputed districts the number of white voters who in primaries do not support the black candidate favored by the black community constituted a majority of the entire electorate.<sup>90</sup> Under those

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<sup>90</sup> Given the small percentage of black voters, the failure of this number of whites to vote for black candidates presented a substantial barrier. The lower the black population of the district, the more white voters it takes voting for the black candidate to make it

circumstances, the election of candidates preferred by black voters, while not mathematically impossible, is obviously extremely difficult.

Appellants attack the lower court's finding of substantial polarized voting by selectively citing the record. Of the 53 elections discussed by the trial court,

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possible for him to win. Moreover, no evidence was presented to show that the extent of racial polarization was declining. JA 137, 140.

Here, while there are a large number of black citizens, because they are submerged into such large multimember districts, they are a small percentage of the total electorate. For example, in House District 36 (Mecklenburg County), there are 107,006 black residents, Px 4(b), JA Ex. Vol. II, more than enough for two whole House Districts, id., but because they are submerged into an eight member district, they are only 26.5% of the population. Because the percentage of the registered voters in each of the districts which is black is relatively low, ranging from 15% to 29%, it takes little polarization to impede materially the ability of the black community to elect candidates of its choice.

appellants refer only to 8. A. Br. 36-38. In most instances, appellants emphasize the election at which white support for a black candidate was the highest of any election in that district.<sup>91</sup> The highest proportion of white support for minority candidates cited by appellants were in the 1982 Durham County general elections and the 1982 Mecklenburg County primary. (A. Br. 36-37), but there were no Republican candidates in the 1982 general election in Durham County, and in the 1982 Mecklenburg County primary there were only seven white candidates for eight positions in the primary. JA 46, 44. Thus the white votes of 47% and 50% in those two races represent the number of whites willing to vote for an unopposed black instead of not voting at all, rather than the proportion

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<sup>91</sup> This is true of examples (a)(b)(h)(i) and (j) in Appellants' Brief. See JA 152.

of whites willing to support in a contested election a minority candidate favored by the minority community.

IV. THE DISTRICT COURT FINDING OF UNEQUAL ELECTORAL OPPORTUNITY WAS NOT CLEARLY ERRONEOUS

A. The Clearly Erroneous Rule Applies

Appellants contend that, even if the district court was applying the correct legal standard, the court's subsidiary factual findings, as well as its ultimate finding that minority voters do not enjoy an equal opportunity to elect candidates of their choice in the disputed districts, were mistaken. Appellants correctly describe these contentions as presenting a "factual question."<sup>92</sup> The lower courts

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<sup>92</sup> A. Br. 25; see also *id.* at 35 ("no matter how one weights and weighs the evidence presented, it does not add up to a denial of equal access"), 26 (disputed trial court findings made "in spite of the facts"), 29 ("[n]othing in the record ... supports" a disputed finding), 30 n.12

have consistently held that a finding under section 2 of unequal political opportunity is a factual finding subject to the Rule 52 "clearly erroneous" rule.<sup>93</sup>

The courts of appeal considering constitutional vote dilution claims prior to Bolden also applied the clearly erroneous rule to findings of the trial court.<sup>94</sup>

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(testimony relied on by the trial court "was simply not credible"), 30 (plaintiffs "failed to prove" a subsidiary fact).

<sup>93</sup> Collins v. City of Norfolk, 768 F.2d 572, 573 (4th Cir., July 22, 1985) (slip opinion, p. 4); McCarty v. Henson, 749 F.2d 1134, 1135 (5th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 371, 380 (5th Cir. 1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1021 (5th Cir. 1984); United States v. Marengo County Com'n, 731 F.2d 1546, 1552 (11th Cir. 1984); Buchanan v. City of Jackson, 708 F.2d 1066, 1070 (6th Cir. 1983).

<sup>94</sup> Parnell v. Rapidas Parish School Bd., 563 F.2d 180, 184-5 (5th Cir. 1977); Hendrix v. Joseph, 559 F.2d 1265, 1268 (5th Cir. 1977); McGill v. Gadsden County Comission, 535 F.2d 277, 280 (5th Cir. 1976); Gilbert v. Sterrett, 508 F.2d 1389., 1393 (5th Cir. 1975); Zimmer v. McKeithen, 485 F.2d at 1302 n.8 (majority opinion), 1309-10 (Coleman, J., dissenting), 1314 (Clark,

Until recently the United States also maintained, that absent any failure to apprehend and apply the correct legal standards, a finding of unequal electoral opportunity under section 2 was a factual finding subject to Rule 52(a), F.R. Civ. P.<sup>95</sup>

The Solicitor General now asserts, however, that Rule 52 does not apply to a finding of vote dilution under section 2. The Solicitor acknowledges that the determination of a section 2 claim "requires a careful analysis of the challenged electoral process, as informed by its actual operation." U.S. Br. II, 18. But, he urges that the ultimate finding of the trial court based on that

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J., dissenting).

<sup>95</sup> See Brief for the United States, United States v. Dallas County Commission, 11th Cir, (No. 82-7362) (dated March 27, 1983) p. 26.



analysis may be reversed whenever an appellate court views the facts differently.

The arguments advanced by the Solicitor do not justify any such departure from the principles of Anderson v. City of Bessemer City, 84 L.Ed.2d 518 (1985). A number of the cases relied on by the Solicitor General involved simple matters of statutory construction,<sup>96</sup> or the meaning of a constitutional right where the facts were not in dispute.<sup>97</sup>

In Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984) this Court declined to apply Rule 52, but it did so only because the Constitution requires appellate courts in First Amendment cases to undertake "an

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<sup>96</sup> Metropolitan Edison Co. v. PANE, 460 U.S. 766 (1983); Harper & Row, Publisher v. Nation, 85 L.Ed.2d 588, 600-02 (1985).

<sup>97</sup> Strickland v. Washington, 80 L.Ed.2d 674 (1984).

independent examination of the whole record." 80 L.Ed.2d at 515-26. The Solicitor suggests that the special standard of appellate review in Bose should be extended to any statutory claim in which "the stakes ... are too great to entrust them finally to the judgment of the trier of fact." U.S. Br. II 19. But this Court has already applied Rule 52 to Fourteenth Amendment claims of purposeful discrimination in voting,<sup>98</sup> to claims of discriminatory effect under section 5 of the Voting Rights Act,<sup>99</sup> and to claims arising under Title VII of the 1964 Civil Rights Act.<sup>100</sup> The "stakes" in each of these areas of the law are surely as great as

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<sup>98</sup> Hunter v. Underwood, 85 L.Ed.2d 222, 229 (1985); Rogers v. Lodge, *supra*, at 622-23.

<sup>99</sup> City of Rome v. United States, 446 U.S. 156, 183 (1980).

<sup>100</sup> Anderson v. City of Bessemer City, *supra*;

under Section 2. Cf. Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240, 263-64 (1975). As this Court emphasized in White v. Regester, a district court called upon to resolve a vote dilution claim occupies "its own special vantage point" from which to make an "intensely local appraisal" of the existence of racial vote dilution.<sup>101</sup> 412

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<sup>101</sup> The application of Rule 52 is particularly appropriate in a case such as this where the appellants' brief is replete with controverted or clearly inaccurate factual assertions. For example, appellants state without citation, "In Halifax, several blacks have been elected to the County Commission and the City Council of Roanoke Rapids." A. Br. 11. This is false. No black had ever been elected to either body. JA 233. Appellants state, "The Chair of the Mecklenburg County Democratic Executive Committee at the time of trial and his immediate predecessor are also black. Stip. 126." A. Br. 8. Stipulation 126 actually says, "The immediate Past Chairman of the Mecklenburg County Democratic Executive Committee, for the term from 1981 through May 1983, was Robert Davis, who is black. Davis is the only black person ever to hold that position." JA 105. Appellants state that "If Forsyth County were divided into

U.S. at 769.

From "its own special vantage point" the court here made detailed and extensive fact findings on virtually all the factors the Senate Report thought probative of a section 2 violation. The findings of the district court involved six distinct multi-member districts, the circumstances of which were of course not precisely identical. Appellants neither contend that these differences are of any importance or suggest that the trial court's ultimate finding of unequal electoral opportunity under the totality of circumstances is any

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single member House districts, one district with a population over 65% black could be formed. Stip. 129." App. Br. 9. Stipulation 129 in fact says that two majority black districts could be formed. JA 105. The omission is particularly deceptive since the remedy proposed by appellants, which was accepted unchanged by the district court, contained two districts in Forsyth County which are majority black in voter registration.

less justifiable in any one district than in the others. Rather, appellants advance objections which they contend are equally applicable to all the districts at issue. Appellants attack the district court's ultimate finding by generally challenging each of the subsidiary findings on which it is based. A. Br. 25-34.

B. Evidence of Prior Voting Discrimination

The district court, after describing the long North Carolina history of official discrimination intended to prevent blacks from registering to vote, as well as some relatively recent efforts to counteract the continuing effects of that discrimination, concluded:

The present condition .... is that, on a state wide basis, black voter registration remains depressed relative to that of the white majority, in part at least because of the long period

of official state denial and chilling of black citizens' registration efforts. This statewide depression of black voter registration levels is generally replicated in the areas of the challenged districts, and in each is traceable in part at least to the historical statewide pattern of official discrimination here found to have existed. JA 27-28.

Such disparities in black and white registration, rooted in past and present discrimination, is one of the factors which Congress recognized puts minority votes at a comparative disadvantage in predominantly white multi-member districts. Senate Report 28.

Appellants concede, as they must, that it was for decades the avowed policy of the state to prevent blacks from registering to vote. A. Br. 25. The district court noted, for example, that in 1900 the state adopted a literacy test for the avowed purpose of disfranchising black



voters, and that that test remained in use at least until 1970. JA 25. Appellants argue, as they did at trial, that all effects of these admitted discriminatory registration practices were entirely eliminated because recent state efforts to eliminate those effects "have been so successful." A. Br. 27. The district court, however, concluded that recent registration efforts had not been sufficient to remove "the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens" JA 27.

The district court's finding is amply supported by the record below. In every county involved in this litigation the white registration rate exceeds that of blacks, and in many of those counties the differential is far greater than the

statewide disparity.<sup>102</sup> Id. at n.22. Even appellants' witnesses acknowledged that this disparity was unacceptably great. Px 40; T.575-77, 1357; JA 199. There was direct testimony that the history of mistreatment of blacks continued to deter blacks from seeking to register. JA 175, 188-89, 211-12, 220-25, 229, 242-43.

Appellants contend that in the last few years the state board of elections has taken steps to register blacks who might have been rejected or deterred by past practices. A. Br. 26. But the state's involvement did not begin until 1981, and the record was replete with evidence that, long after the literacy test ceased to be

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<sup>102</sup> In 1971, the year after use of the discriminatory literacy test ended, 60.6% of whites were registered, compared to 44.4% of qualified blacks. As of 1982 that registration gap had only been slightly narrowed, with 66.7% of whites and 52.7% of blacks registered. JA 26.

used, local white election officials at the county level pursued practices which severely limited the times and places of registration and thus perpetuated the effects of past discriminatory practices.<sup>103</sup> Under these circumstances the district court was clearly justified in finding that minority registration levels remained depressed because of past discriminatory practices.

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<sup>103</sup> In a number of instances registration was restricted to the county courthouse, locations that especially burdened the large numbers of blacks who did not own cars. JA 220-22, 229; JA Ex. Vol. I Ex. 37-52. Local election officials severely limited the activities of voluntary or part-time registrars, only allowing them, for example, to register new voters outside his or her own precinct when the state board of elections required them to do so. T. 525, 553-55; JA 212, 222-24.

C. Evidence of Economic and Educational Disadvantages

The district court concluded that minority voters were substantially impeded in their efforts to elect candidates of their choice by the continuing effects of the pervasive discrimination that affected, and to a significant degree continues to affect, every aspect of their lives. JA 28-31.

The court concluded that past discrimination had led to a variety of social and economic disparities.<sup>104</sup> Such

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<sup>104</sup> The mean income of black citizens was only 64.9% that of white citizens. Approximately 30% of all blacks have incomes below the poverty level, compared to only 10% of whites; conversely, the proportion of whites earning over \$20,000 a year is twice that of blacks. JA 30. Since significant desegregation did not occur in North Carolina until the early 1970's, most black adults attended schools that were both segregated and qualitatively inferior for all or most of their primary and secondary education. JA 29. See Gaston County v United States, 395 U.S.

social and economic disparities were cited by Congress as a major cause of unequal opportunity in multi-member districts. S. Rep. 29.<sup>105</sup> Appellees adduced evidence documenting these disparities in each of

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285, 292-96 (1969). Residential housing is rigidly segregated throughout the state, JA 29, and is almost total in each of the challenged districts. T. 268, 648, 739; JA 176-7, 201-2, 219, 240, 263-4; JA Ex. Vol. II, Px 3a-8a.

<sup>105</sup> Congress deemed evidence of substantial social and economic disparities sufficient by itself to demonstrate that blacks would be at a significant disadvantage in a majority white district. The Senate Report directs the courts to presume, where those disparities are present, that "disproportionate education, employment, income level and living conditions arising from past discrimination tend to depress minority political participation..." *Id.* 29 n.114. The propriety of such an inference was an established part of the pre-Bolden case law expressly referred to by Congress, and is an established part of the post-amendment section 2 case law as well. *United States v. Marengo County*, 731 F.2d at 1567-68. See also *McMillan v. Escambia County*, 748 F.2d at 1044; *United States v. Dallas County*, 739 F.2d 1529, 1537 (11th Cir. 1984).

the challenged districts<sup>106</sup> and appellants do not dispute their existence.

Appellants attack the district court's finding that these undisputed disparities substantially impeded the ability of blacks to participate effectively in the political process, asserting that "plaintiffs failed to prove that political participation on the part of blacks in North Carolina was ... in any way hindered." A. Br. 30. But appellees in fact introduced the evidence which

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<sup>106</sup> Mecklenburg County: T. 243, 436; JA Ex. Vol. I Ex. 37; JA 77-89.

Durham County: T. 647-51, 686; JA Ex. Vol. I Ex. 39; JA 77-89.

Forsyth County: T. 595-96, 611, 734; JA Ex. Vol. I Ex. 38; Hauser deposition 35, 36, 38

Wake County: T. 130, 1216-18; JA Ex. Vol. I Ex. 40; JA 77-89.

House District 8: T. 701-03, 740-41, 742-44; JA Ex. Vol. I Ex. 41-43; JA 77-89.



appellants assert was missing, documenting in detail precisely how the admitted disparities impeded the electoral effectiveness of black voters. That evidence demonstrated that the cost of campaigns was substantially greater in large multi-member districts, and that comparatively poor black voters were less able than whites to provide the financial contributions necessary for a successful campaign.<sup>107</sup> Minority voters were far less likely than whites to own or have access to a car, without which it was often difficult or impossible to reach polling

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<sup>107</sup> T. 130; JA 177-78, 180-1, 235-6; JA Ex. Vol. I Ex. 14-17; Hauser Deposition, 35. There was also more general testimony regarding the net impact of these disparities. JA 168, 213-14; 236-7. See *David v. Garrison*, 553 F.2d 923, 927, 929 (5th Cir. 1977); *Dove v. Moore*, 539 F.2d 1152, 1154 n.3 (8th Cir. 1976); *Hendrick v. Walder*, 527 F.2d 44, 50 (7th Cir. 1975).

places or registration sites.<sup>108</sup> Minority candidates, living in racially segregated neighborhoods and a racially segregated society, had far less opportunity than white candidates to gain exposure and develop support among the majority of the voters who were white.<sup>109</sup>

Appellants urge that this evidence was rebutted by the fact that eight witnesses called by appellees were politically active blacks. A. Br. 29-30. But the issue in a section 2 dilution proceeding is not whether any blacks are participants in any way in the political process,

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<sup>108</sup> T. 634, 686; JA 77; JA Ex. Vol. I Ex. 37-52. The district court noted that 25 % of all black families, compared to 7.3% of white families, have no private vehicle available for transportation. JA 30.

<sup>109</sup> T. 782; JA 176-81, 213-14, 239.

but whether those who participate have an equal opportunity to elect candidates of their choice. The mere fact that eight or even more blacks simply participate in the electoral process does not, by itself, support any particular conclusion regarding the existence of such equal opportunity. In this case the instances cited by appellants as the best examples of the degree to which the political process is open to blacks actually tend to support the trial court's conclusions to the contrary. All the specific political organizations which appellants insist blacks are able to participate in are either civil rights or black organizations;<sup>110</sup> only two of the individuals cited

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<sup>110</sup> The organizations referred to by appellants are the Nash County NAACP, the Mecklenburg County Black Caucus, the Second Congressional District Black Caucus, the Durham Committee on the Affairs of Black People, the Wilson Committee on the Affairs of Black People, the Raleigh-Wake Citizens

by appellants held elective office, and both positions were chosen in majority black single member districts.<sup>111</sup>

D. Evidence of Racial Appeals by White Candidates

The district court concluded that the ability of minority voters to elect candidates of their choice was significantly impaired by a statewide history of white candidates urging white voters to vote against black candidates or against white candidates supported by black voters:

[R]acial appeals in North Carolina political campaigns have for the past thirty years been widespread and persistent .... [T]he historic use of racial appeals in political campaigns in North Carolina persists to the present time and

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Association, the Black Women's Political Caucus, and the Wake County Democratic Black Caucus. A. Br. 11-12, 30.

<sup>111</sup> JA 103, Stip. 143; JA 201, 237.

... its effect is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political process and to elect candidates of their choice. JA 34.

Congress noted that the use of such racial appeals to white voters might make it particularly difficult for black candidates to be elected from majority white districts. Senate Report 29. The noxious effects of such appeals are not limited to the particular election in which they are made; white voters, once persuaded to vote against a candidate because of his or her race or the race of his or her supporters, may well vote in a similar manner in subsequent races. JA 34.<sup>112</sup>

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<sup>112</sup> "The contents of these materials reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices" toward black political participation. *Id.* According to a black witness at trial, one of the biggest obstacles to black candidates is "con-

Appellants object that, of the six elections referred to by the district court as involving racial appeals, only two occurred within the last 15 years. A. Br. 32a. But these particular elections were not cited by the trial court as the sole instances of racial appeals. Rather, those six elections were listed as the most blatant examples, JA 34, and the opinion added that "[n]umerous other examples of ... racial appeals in a great number of local and statewide elections abound in the record." *Id.* Among the additional instances of racial appeals documented in the record referred to by the district court are elections in 1976,<sup>113</sup> 1980,<sup>114</sup> and 1982.<sup>115</sup>

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vincing the white voter that there is nothing to fear from having blacks serve in elective office." JA 179.

<sup>113</sup> T. 330-38, 390-91; Px 44.

<sup>114</sup> T. 356-358.



Appellants also urge that the presence of racial appeals cannot be proved merely by evidence as to the content of the advertisements or literature used by white candidates; rather, they assert, some form of in depth public opinion poll must be conducted to demonstrate what meaning white voters acknowledge attaching to the racist materials used by white candidates. A. Br. 31-32. Public opinion polls are not, however, the ordinary method of establishing the meaning of disputed documents; indeed, if racial appeals have been effective, the white voters to whom those appeals were addressed are unlikely to discuss the matter with complete candor. Local federal judges, with personal knowledge of

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115 T. 354, 357-69; JA 164-67; ;JA Ex. Vol. I Ex. 23-26, 36.

the English language and the culture in which they live, are entirely competent to comprehend the meaning of the spoken and written word in a wide variety of contexts, including political appeals. No public opinion poll is necessary to understand the significance of appeals such as "White People Wake Up", T. 245-46; JA Ex. Vol. I Ex. 21, or to realize why, although typically unwilling to provide free publicity to an opponent, a candidate would publicize a photograph of his opponent meeting with a black leader. T. 356-58; JA 166-67; JA Ex. Vol. I Ex. 36. Indeed, these judges, all North Carolina natives conversant with local social and political realities, were able to determine that recent racial appeals, while at times "less gross and virulent," JA 33, "pick up on the same obvious themes": "black domination" over "moderate" white

candidates and the threat of "negro rule" or "black power" by blacks "bloc" voting.  
Id.<sup>116</sup>

E. Evidence of Polarized Voting

The sufficiency of the evidence supporting the district court's finding of polarized voting is set out at pp. 88-95, supra.

F. The Majority Vote Requirement

The district court found that the majority runoff requirement impaired the ability of blacks to elect candidates of their choice from the disputed districts. JA 31-32. Although no black candidate seeking election to one of the at-large

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<sup>116</sup> For example, using a frequent pun for black, a candidate in 1982 in Durham denounced his black opponent for "bus-sing" [sic] his "block" vote to the polls. JA Ex. Vol. I Ex. 23-26.

seats has ever been forced into a runoff because of this rule, A. Br. 27, the issue at trial was not whether the runoff rule had led directly to the defeat of black legislative candidates, but whether that rule indirectly interfered with the ability of minority voters to elect candidates of their choice. The majority vote requirement has prevented black citizens from being elected to statewide, congressional, and local level positions, T. 958-959, 967, JA 203-4; Dx 48, p. 20. The exclusion of blacks from these offices has operated indirectly to interfere with the ability of blacks to win legislative

elections.<sup>117</sup> The court's findings have a substantial basis in the record and corroborate Congress' concern that in vote dilution cases, majority vote requirements are "typical factors" which "may enhance the opportunity for discrimination against the minority group." Senate Report at 29.<sup>118</sup>

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<sup>117</sup> Because of the effect of the runoff requirement in state and local offices, black voters were deprived of an opportunity to prepare for legislative elections by winning local office, of the possible assistance of minority officials in higher office, and of a pool of experienced minority campaign workers. T. 142, 192, 960, 967; JA 175-77, 179-80.

<sup>118</sup> This Court has also recognized the discriminatory potential of runoff requirements. See, e.g., City of Port Arthur v. United States, 459 U.S. 159 (1982); City of Rome v. United States, 446 U.S. 156, 183-84 (1980).

G. Evidence Regarding Electoral Success of Minority Candidates

Having identified a number of specific aspects of the challenged at-large systems which interfered with the ability of blacks to participate in the political process or elect candidates of their choice, the district court examined as well actual election outcomes to ascertain the net impact of those practices. The court concluded:

[T]he success that has been achieved by black candidates to date is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even to arguably support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state -- either generally or specifically in the areas of the challenged districts. JA 39-40.



Much of the argument advanced by both appellants and the Solicitor General is an attack on this factual finding.

As the facts stood in September, 1981, when this action was filed, the correctness of this finding could not seriously have been disputed. Prior to 1972 no black candidate had ever been elected from any of the six disputed multi-member districts. From 1972-1980 no black representatives served in at least three of the districts; far from having, as the Solicitor suggests, a level of representation comparable to their proportion of the population, at any given point in time, prior to 1982 more than two-thirds of the black voters had no elected black representatives at all. In six of the disputed districts, with an average black population of well over 25%, a total of 30 legislators were elected at

large. Prior to 1982 no more than two or three black candidates were successful in any election year.<sup>119</sup>

Appellants rely solely on the results of the 1982 elections in attacking the findings of the district court. The outcome of the 1982 elections, held some 14 months after the filing of this action, were strikingly different than past elections. Although in 1980 only two districts had elected black candidates, four of the districts did so in 1982. For the first time in North Carolina history two blacks were elected simultaneously from the same multi-member legislative district, resulting in five black legislators.<sup>120</sup>

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<sup>119</sup> Statewide, the number of black elected officials remains quite low, and has not increased significantly since 1975. JA 35; JA Ex. Vol. I Ex. 22.

<sup>120</sup> Although appellees state that seven blacks were elected in 1982, two were elected

Appellants contended at trial that the 1982 elections demonstrated that any discriminatory effect of the at-large systems had, at least since the filing of the complaint, disappeared. The district court expressly rejected that contention:

There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent --but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation. JA 39.

The central issue regarding the significance of minority electoral success is whether the district courts' evaluation of the obviously unusual 1982 election results was clearly erroneous. The parties offered at trial conflicting evidence

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from majority black House districts in section 5 covered counties which although they include some counties in Senate District 2, are not in question here. Stip. 95, JA 94; JA 35.

regarding the significance of the 1982 elections.<sup>121</sup> The evidence suggesting that the 1982 elections were an aberration was manifestly sufficient to support the trial court's conclusion. First, as the district court noted, there was evidence that white political leaders, who had previously supported only white candidates, for the first time gave substantial assistance to black candidates and did so for the

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<sup>121</sup> In Forsyth County, for example, appellants pointed to isolated instances of electoral success prior to 1982 which the court weighed in conjunction with evidence of electoral failures such as the defeat of all black Democratic candidates, including appointed incumbents, in 1978 and 1980, years in which all white Democrats were successful. JA 37. In House District No. 8, which is 39% black in population, no black had ever been elected and from Mecklenburg, in the eight member House and four member Senate districts, only one black senator (1975-1979) and no black representatives had been elected this century prior to 1982. JA 36. Moreover, as in Forsyth, in general elections wherever there was a black Democrat running, black Democrats were the only Democrats to lose to Republicans. JA 135.

purpose of influencing this litigation and preventing the introduction of single member districts.<sup>122</sup> Second, in Mecklenburg County there were fewer white candidates than there were seats, thus assuring that a black candidate would win the primary.<sup>123</sup> Third, conversely, in Forsyth County there was such a surfeit of white candidates that the splintering of the white vote gave blacks an unusual opportunity.<sup>124</sup>

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<sup>122</sup> Hauser Deposition, 49; JA 259-60.

<sup>123</sup> JA 44. Moreover, the black candidate who lost in the general election was the only Democratic candidate to lose. In House District 23, there were only 2 white candidates for 3 seats in the 1982 primary, and the black candidate who won ran essentially unopposed in the general election, but still received only 43% of the white vote. JA 46, 142-3, 153.

<sup>124</sup> JA 137--8. There were 9 white Democratic candidates, none of them incumbents, running for 5 seats. Appellees' expert testified that the likelihood of two blacks getting elected again in the multi-member district was "very close to zero." Id.

Fourth, in 1982, as occurs only once every six years, there was no statewide race for either President or United States Senate, as a result of which white and Republican turnout was unusually low.<sup>125</sup> Fifth, in one county, black leaders had been able to bring about the election of a black legislator only by selecting a candidate who had not been visibly outspoken about the interests of the black community.<sup>126</sup> Finally, in a number of instances black candidates won solely because black voters in unprecedented numbers resorted to

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<sup>125</sup> T.142-144, 179; JA 137-39, 140. White turnout was 20% lower than in 1980.

<sup>126</sup> Hauser Deposition 42-43; JA 205-6. The ability of some blacks to get elected does not mean they are the representatives of choice of black voters. T 691, 1291-4, 1299; JA 214-15.



single shot voting, forfeiting their right to participate in most of the legislative elections in order to have some opportunity of prevailing in a single race.<sup>127</sup>

The success of black candidates in 1982 was viewed by the court as a concatenation of these various factors, each of which either was a freak occurrence

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<sup>127</sup> Experts for both appellants and appellees agreed that black voters had to single shot vote in order to elect black candidates in the districts at issue. T. 797-8; JA 136, 148-49, 150, 278-79. Lay witnesses for both parties also agreed that the victories of black candidates were due in large measure to extensive single shot voting by blacks. T. 1099; JA 228, 258-59.

over which appellees had no control,<sup>128</sup> or in and of itself underscored the inequality in the multi-member election system.<sup>129</sup>

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<sup>128</sup> The likelihood, for example, of repeating successfully the 1982 election of blacks in the challenged Forsyth House District was "very close to zero." JA 137. Moreover, unlike white Democrats, not a single one of whom lost in the 1982 general elections, black Democrats in the other districts still enjoyed only haphazard success. Thus, the court was not presented with the fact situation of Whitcomb v. Chavis, 403 U.S. 124 (1971).

<sup>129</sup> The necessity of single shot voting is a distinct handicap because it exacerbates the competitive disadvantage minority voters already suffer because of their numerical submergence. White voters get to influence the election of all candidates in the multi-seat system, whereas blacks must relinquish any opportunity to influence the choice of other representatives in order to concentrate their votes on the minority candidate. As a result, white candidates can ignore the interests of the black community with impunity. See discussion supra at 59-62.

H. Responsiveness

Appellees did not attempt to prove the unresponsiveness of individual elected officials. In a section 2 case unresponsiveness is not an essential part of plaintiff's case.<sup>130</sup> Senate Report 29 n.116;<sup>131</sup> Appellants' de minimus evidence

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<sup>130</sup> This Court held in Rogers v. Lodge, 458 U.S. 613, 625 n.9, that unresponsiveness is not an essential factor in establishing a claim of intentional vote dilution under the Fourteenth Amendment.

<sup>131</sup> Because section 2 protects the right to participate in the process of government, "not simply access to the fruits of government", and because "the subjectiveness of determining responsiveness" is at odds with the Congressional emphasis, a showing of unresponsiveness might have some probative value, but a showing of responsiveness has little. United States v. Marengo County, 731 F.2d at 1572. See also Jones v. Lubbock County, 727 F.2d at 381, 383 (upholding a violation of section 2 despite a finding of responsiveness); McMillan v. Escambia County, 748 F.2d at 1045-1046.

of responsiveness<sup>132</sup> may be relevant rebuttal evidence, but only if appellees had attempted at trial to prove unresponsiveness. Id.

I. Tenuousness of the State Policy for Multimember Districts

The district court correctly recognized that while departure from established state policy may be probative of a

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<sup>132</sup> The only testimony cited to support their assertion that appellees' "witnesses conceded that their legislators were responsive", A. Br. 32, was the testimony of one witness who testified on cross-examination that of twelve Representatives and Senators from Mecklenburg County, two, the black representative and one white representative, were responsive. JA 184-86. The only other evidence was the self serving testimony of one defense witness, listed in toto in footnote 14 to appellants' brief. Furthermore, appellants' assertion that white representatives must be responsive because "white candidates need black support to win" A. Br. at 34, is not supported by the record. In the challenged districts, white candidates consistently won without support from black voters. See, supra, 62 n.69; JA 231-2.

violation of section 2, a consistently applied race neutral policy does not negate appellees' showing, through other factors, that the challenged practice has a discriminatory result. JA 51, citing S. Rep. at 29, n.117.

In this case, the district court did not find the application of a consistent, race-neutral state policy. In fact, after the Attorney General in 1981 objected under section 5 to the 1967 prohibition against dividing counties, both covered counties and counties not covered by section 5 were divided.<sup>133</sup> JA 52.

The Attorney General found that the use of large multi-member districts "necessarily submerges" concentrations of black voters in the section 5 covered counties. Based on the totality of

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<sup>133</sup> The challenged plan divided nineteen counties not covered by Section 5.

relevant circumstances, the court below similarly concluded that, in the non-covered counties as well, black citizens have less opportunity than white citizens to participate in the challenged majority white multi-member districts and to elect representatives of their choice.

The decision of the district court rests on an exhaustive analysis of the electoral conditions in each of the challenged districts. The lower court made detailed findings identifying the specific obstacles which impaired the ability of minority voters to elect candidates of their choice in those districts. The trial court held

... the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district ... having less opportunity than do other members of the electorate to participate in the political



process and to elect representatives of their choice. JA 54.

This ultimate finding of fact, unless clearly erroneous, is sufficient as a matter of law to require a finding of liability under section 2.

CONCLUSION

The decision of the three judge district court should be affirmed.

Respectfully submitted,

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DATED: AUGUST 30, 1985

OCT 7 1985

JOSEPH F. SPANGL, JR.  
CLERK

No. 83-1968

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

---

LACY H. THORNBURG, *et al.*,  
*Appellants,*  
v.  
RALPH GINGLES, *et al.*,  
*Appellees.*

---

On Appeal from the United States District Court  
for the Eastern District of North Carolina

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JOINT APPENDIX EXHIBITS  
VOLUME II

---

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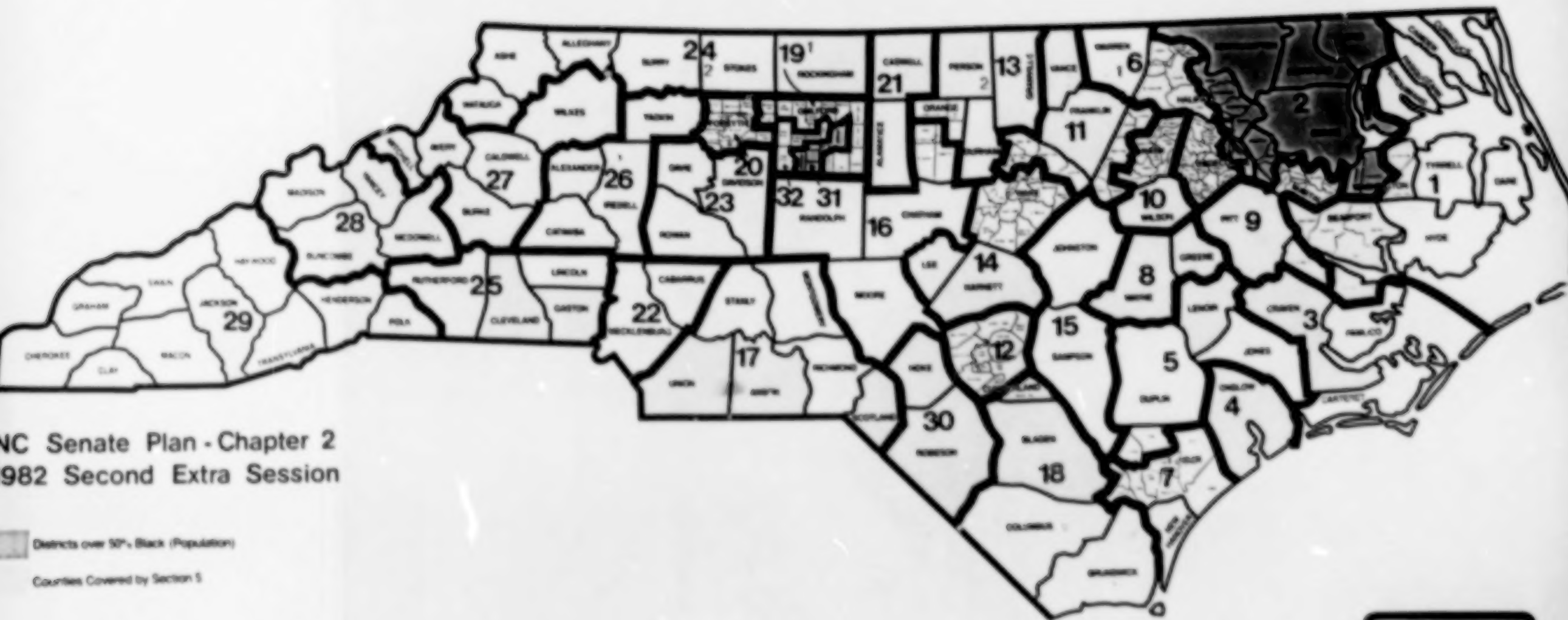
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JURISDICTIONAL STATEMENT FILED JUNE 2, 1984  
PROBABLE JURISDICTION NOTED APRIL 29, 1985

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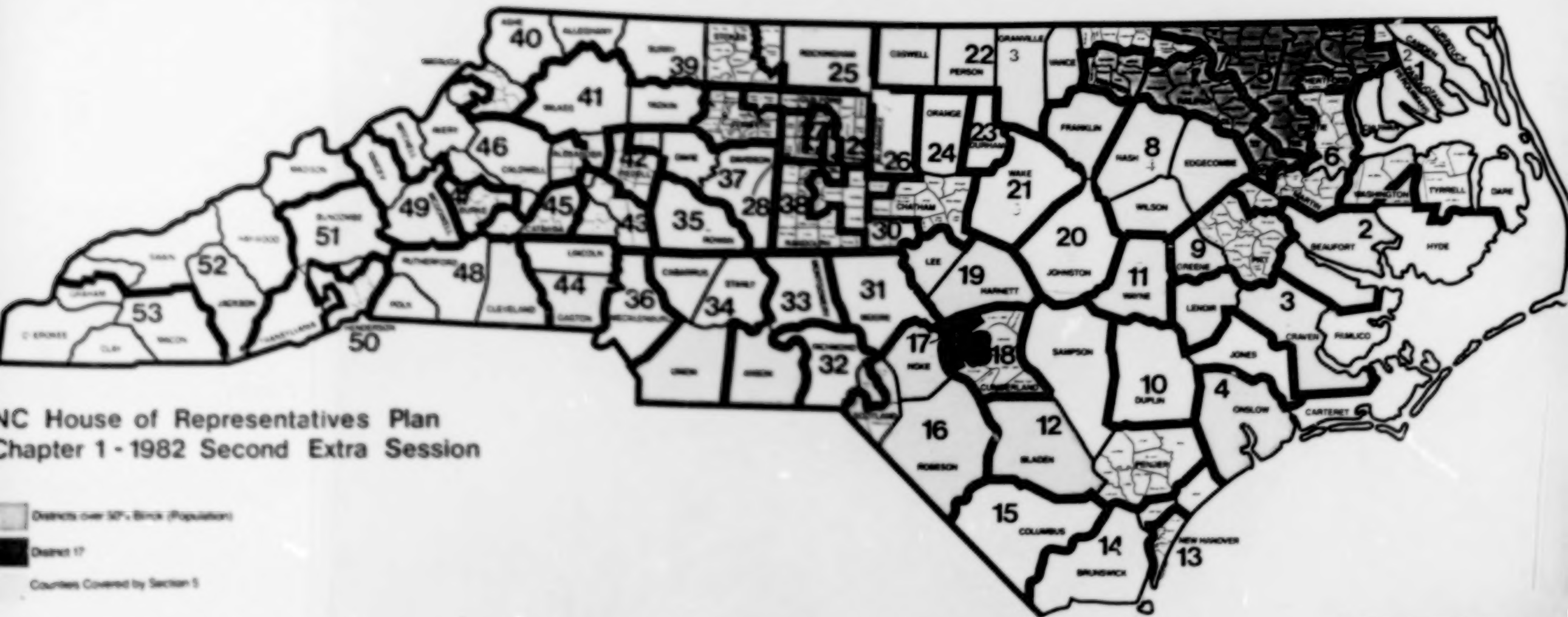
# NC Senate Plan - Chapter 2 1982 Second Extra Session

Districts over 50% Black (Population)

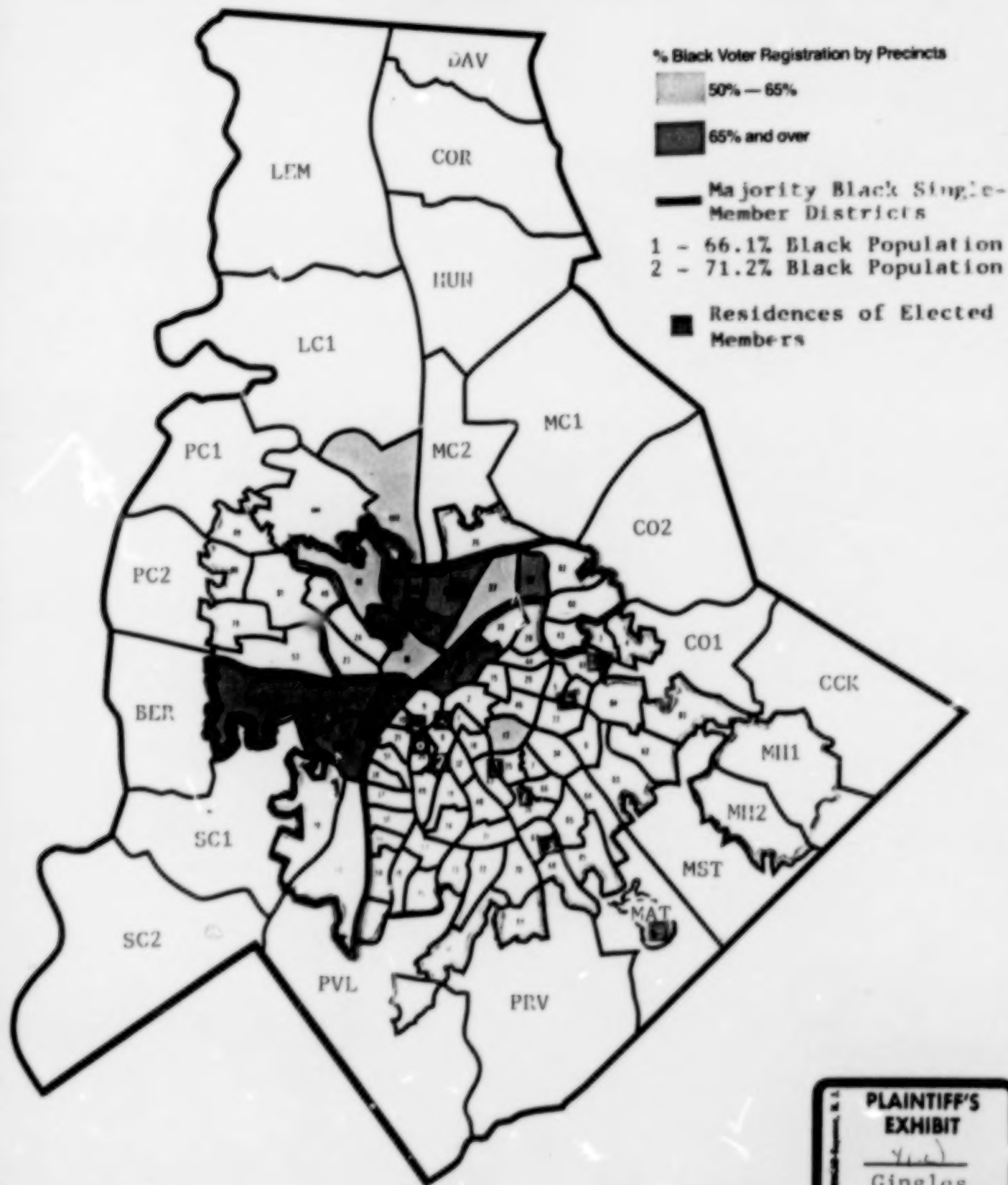
Counties Covered by Section 5

PLAINTIFF'S  
EXHIBIT  
Gingles





# House District 36 - Mecklenburg County 8 Members



PLAINTIFF'S  
EXHIBIT  
Gingles

## LEGEND FOR MAP OF HOUSE DISTRICT 36

### I. Base Map: House District 36 - Mecklenburg County - 8 Members

Total Population	404,270
Total Black Population	107,006
Percent Black Population	26.5%
Percent Deviation	3.0991%

### II. Overlay 1: Majority Black Single Member Districts

	District 1	District 2
Total Population	48,335	49,152
Total Black Population	32,021	35,010
Percent Black Population	66.1%	71.2%
Percent Deviation	-1.38%	.279%

### III. Overlay 2: Residences of Elected Members, 1978-1982

- |  |                          |
|--|--------------------------|
| 1. Marilyn Bissell<br>2216 Providence Rd.<br>Charlotte, NC 28211     | House - 1978             |
| 2. Ben Tison<br>1200 Queens Rd.<br>Charlotte, NC 28207               | House - 1978, 1980       |
| 3. Louise Brennan<br>1201 Dilworth Rd. East<br>Charlotte, NC 28203   | House - 1978, 1980, 1982 |
| 4. Ruth Easterling<br>811 Bromley Rd., Apt. 1<br>Charlotte, NC 28207 | House - 1978, 1980, 1982 |
| 5. Gus Economos<br>2400 Dalesford Dr.<br>Charlotte, NC 28205         | House - 1978, 1980, 1982 |
| 6. Jo Graham Foster<br>1520 Maryland Ave.<br>Charlotte, NC           | House 1978, 1980, 1982   |
| 7. Parks Helms<br>4901 Hadrian Way<br>Charlotte, NC 28211            | House - 1978, 1980, 1982 |

PLAINTIFF'S  
EXHIBIT  
4(b)  
Gingles

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8. Roy Spoon  
7028 Folger Dr.  
Charlotte, NC 28211

House - 1978, 1980, 1982

9. Jim Black  
417 Lynderhill Lane  
Matthews, NC 28286

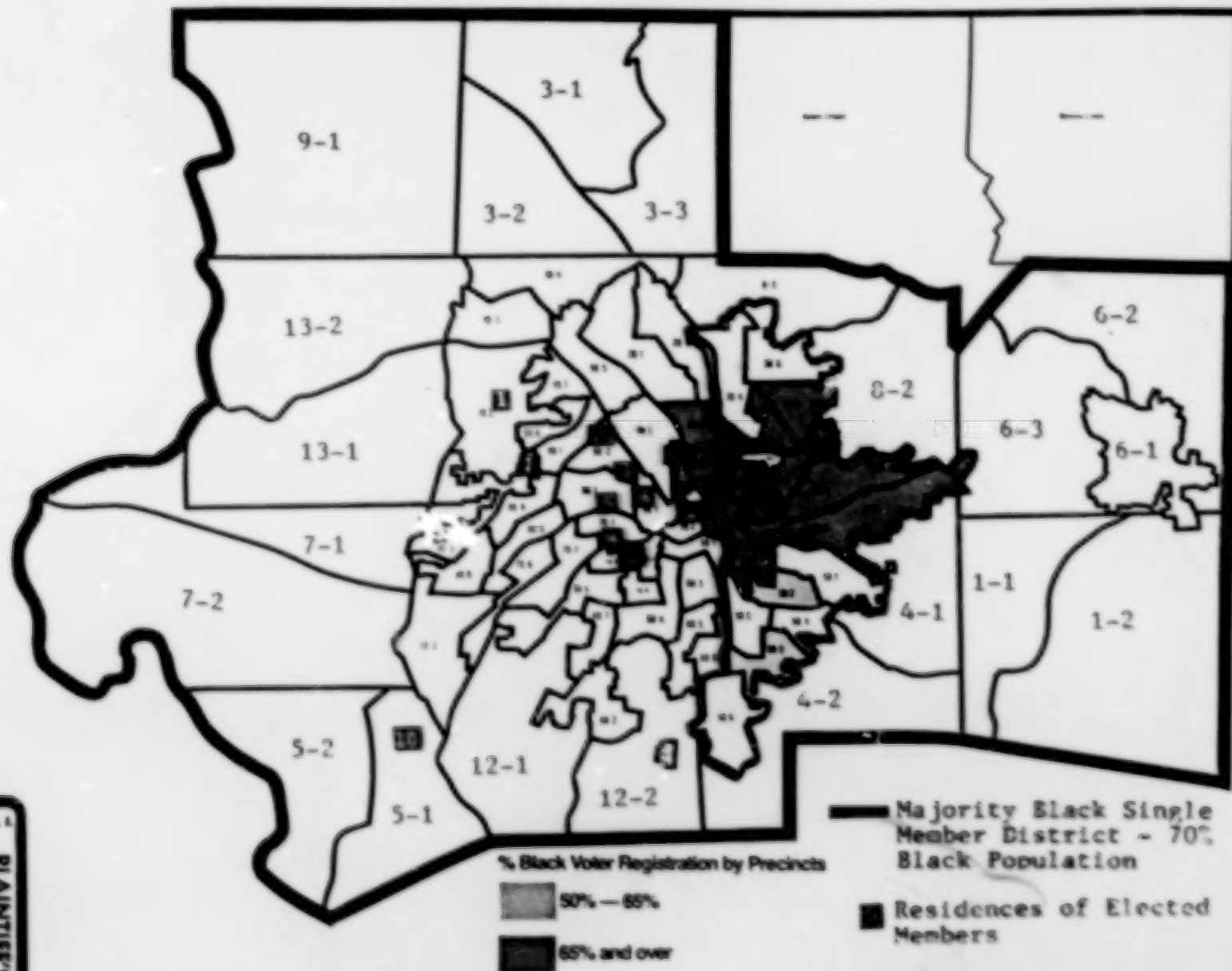
House - 1980, 1982

10. Phil Berry  
3709 Cobbleridge Rd.  
Charlotte, NC

House - 1982



# House District 39 - Forsyth County (part) 5 Members



PLAINTIFF'S  
EXHIBIT  
Gingles

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# LEGEND FOR MAP OF HOUSE DISTRICT 39

## I. Base Map: House District 39 - Forsyth County (part) - 5 members

Total Population	234,315
Total Black Population	58,813
Percent Black Population	25.1%
Percent Deviation	-4.3899%

## II. Overlay 1: Majority Black Single Member District

Total Population	49,995
Total Black Population	34,997
Percent Black Population	70%
Percent Deviation	1.999%

## III. Overlay 2: Residences of Elected Members

- |   |                                     |
|---|-------------------------------------|
| 1. Richard Barnes<br>3810 Carol Lane<br>Winston-Salem, NC 27106       | House - 1978, 1980<br>Senate - 1982 |
| 2. Ted Kaplan<br>702 Summitt St.<br>Winston-Salem, NC 27101           | House - 1978, 1980                  |
| 3. Judson DeRamus<br>792 Arbor Rd.<br>Winston-Salem, NC 27104         | House - 1978                        |
| 4. Margaret Tennille<br>Greenwich Rd.<br>Winston-Salem, NC 27103      | House - 1978, 1980, 1982            |
| 5. Mary N. Pegg<br>3561 Buena Vista Rd.<br>Winston-Salem, NC 27106    | House - 1978, 1980                  |
| 6. Ned R. Smith<br>773 N. Stratford Rd.<br>Winston-Salem, NC 27104    | House - 1980                        |
| 7. Richard Childress<br>3501 Brunswick Ct.<br>Winston-Salem, NC 27104 | House - 1982                        |
| 8. C. B. Houser<br>2072 K-Court Ave.<br>Winston-Salem, NC 27105       | House - 1982                        |
| 9. Arnie Kennedy<br>3727 Spaulding<br>Winston-Salem, NC 27105         | House - 1982                        |

- |   |                           |
|---|---------------------------|
| 10. Tom Womble<br>7557 Tanglewood Ct.<br>Clemmons, NC 27102           | House - 1982              |
| 11. Ann Bagnal<br>2861 Wesleyan Lane<br>Winston-Salem, NC 27106       | Senate - 1978             |
| 12. John J. Cavanagh<br>2200 Rosewood Ave.<br>Winston-Salem, NC 27103 | Senate - 1980             |
| 13. Marvin Ward<br>641 Yorkshire Rd.<br>Winston-Salem, NC 27106       | Senate - 1978, 1980, 1982 |

# House District 23 Durham County 3 Members

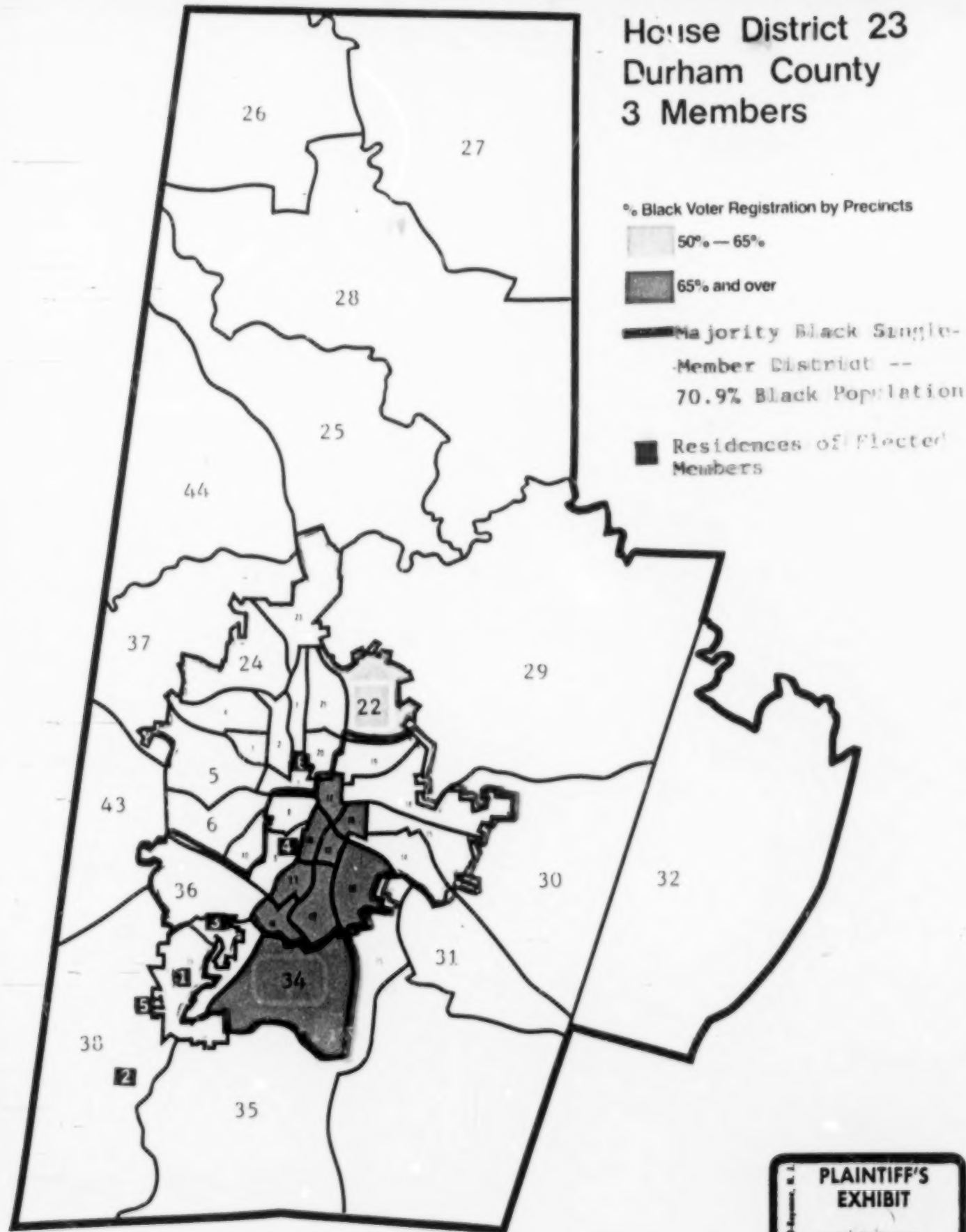
% Black Voter Registration by Precincts

50% — 65%

65% and over

Majority Black Single-Member District --  
70.9% Black Population

Residences of Elected Members



PLAINTIFF'S  
EXHIBIT

Gingles

## LEGEND FOR MAP OF HOUSE DISTRICT 23

### I. Base Map: House District 23 - Durham County - 3 Members

Total Population	152,785
Total Black Population	55,460
Percent Black Population	36.3%
Percent Deviation	3.9042%

### II. Overlay 1: Majority Black Single Member District

Total Population	50,459
Total Black Population	35,781
Percent Black Population	70.9%
Percent Deviation	2.94%

### III. Overlay 2: Residences of Elected Members, 1978-1982

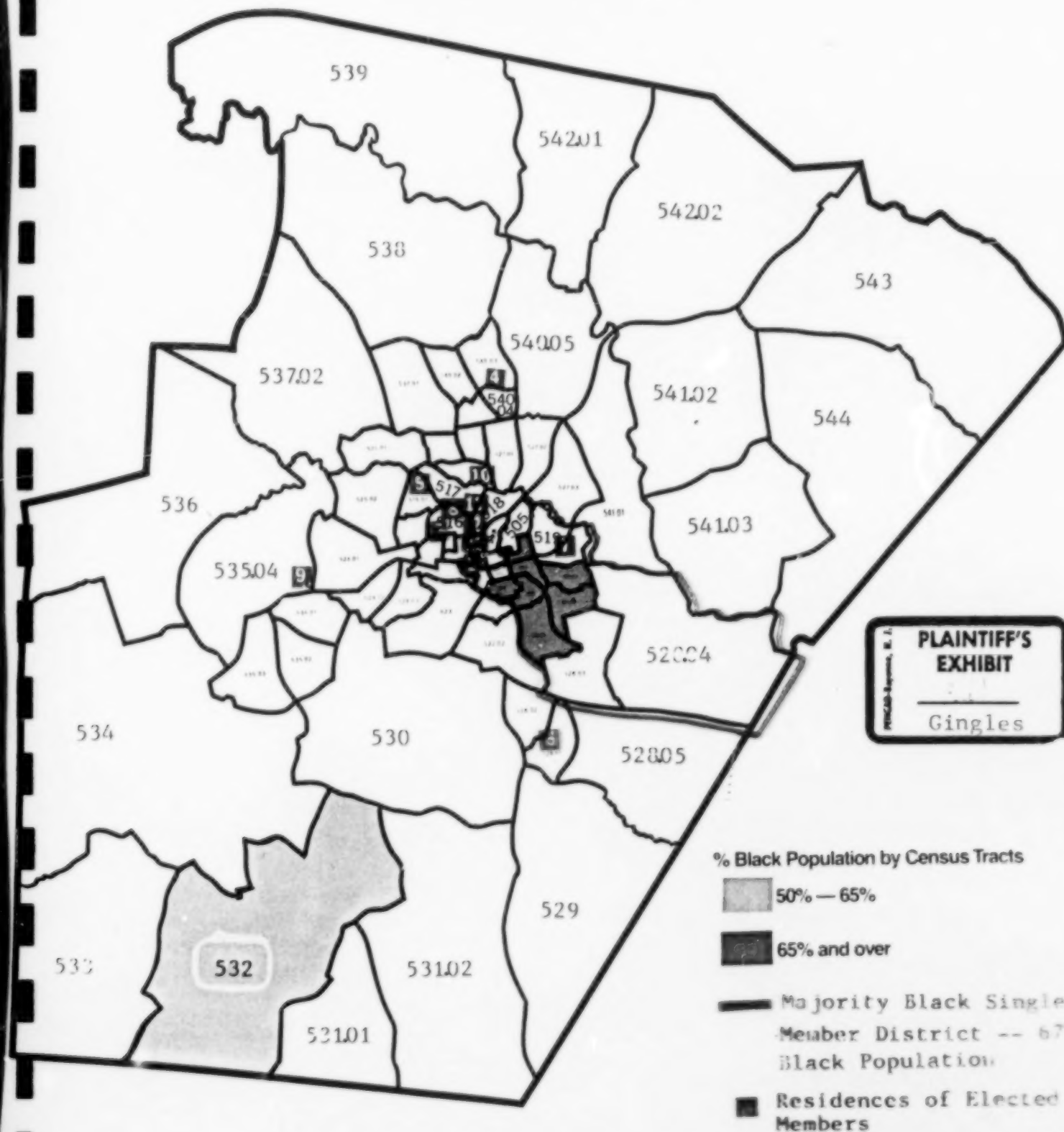
1. George Miller 3862 Somerset Dr. Durham, NC 27707	House - 1978, 1980, 1982
2. Paul Pulley 4720 Farrington Rd. Durham, NC 27707	House - 1978, 1980, 1982
3. Ken Spaulding 2 Shelly Place Durham, NC 27707	House - 1978, 1980, 1982
4. Ken Royall 64 Beverly Drive Durham, NC 27707	Senate - 1978 1980, 1982
5. Willis Whichard 5608 Woodberry Rd. Durham, NC 27707	Senate - 1978
6. Gerry Hancock 923 W. Markham Ave. Durham, NC 27701	Senate - 1980, 1982

PLAINTIFF'S  
EXHIBIT  
6(b)  
Gingles

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# House District 21 - Wake County 6 Members



## LEGEND FOR MAP OF HOUSE DISTRICT 21

### I. Base Map: House District 21 - Wake County - 6 Members

Total Population	301,327
Total Black Population	65,688
Percent Black Population	21.8%
Percent Deviation	2.4614%

### II. Overlay 1: Majority Black Single Member District

Total Population	48,491
Total Black Population	32,476
Percent Black Population	67%
Percent Deviation	-1.06%

### III. Overlay 2: Residences of Elected Members

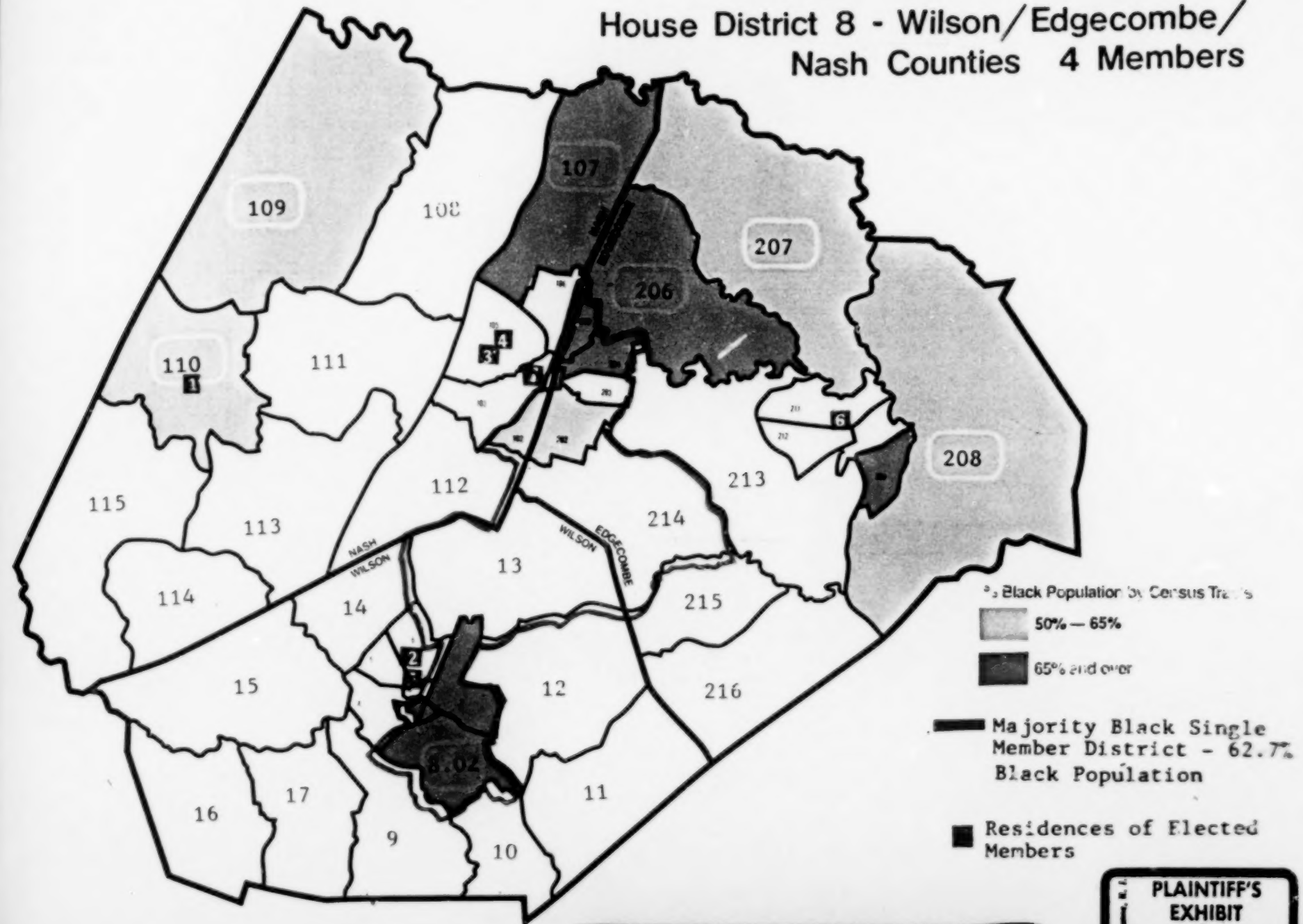
1. Al Adams  
224 Woodburn Rd.  
Raleigh, NC 27605  
House - 1978, 1980, 1982
2. Joe Johnson  
1011 Harvey St.  
Raleigh, NC 27608  
House - 1978  
Senate - 1980, 1982
3. Ruth Cook  
3413 Church Rd.  
Raleigh, NC 27607  
House - 1978, 1980, 1982
4. Aaron Fussell  
1201 Briar Patch Ln.  
Raleigh, NC 27609  
House - 1978, 1980, 1982
5. Casper Holroyd  
1401 Granada Dr.  
Raleigh, NC 27612  
House - 1978
6. Wilma Woodard  
1528 Gleneagle Dr.  
Garner, NC 27529  
House - 1978, 1980  
Senate - 1982
7. Dan Blue  
2541 Albemarle Ave.  
Raleigh, NC 27610  
House - 1980, 1982
8. Marvin Musselwhite  
1903 St. Mary's St.  
Raleigh, NC 27608  
House - 1980, 1982
9. Margaret Stamey  
6201 Arnold Rd.  
Raleigh, NC 27607  
House - 1982

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10. I. Beverly Lake, Jr.  
3703 Shadybrook Dr.  
Raleigh, NC 27609  
Senate - 1978
11. Robert W. Wynne  
915 Holt Dr.  
Raleigh, NC 27608  
Senate - 1978, 1980
12. William A. Creech  
1208 College Place  
Raleigh, NC 27605  
Senate - 1978, 1980

# House District 8 - Wilson/Edgecombe/ Nash Counties 4 Members



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Gingles



## LEGEND FOR MAP OF HOUSE DISTRICT 8

I. Base Map: House District 8 - Wilson/Edgecombe/  
Nash Counties - 4 Members

Total Population 186,273  
Total Black Population 73,577  
Percent Black Population 39.5%  
Percent Deviation -4.9913%

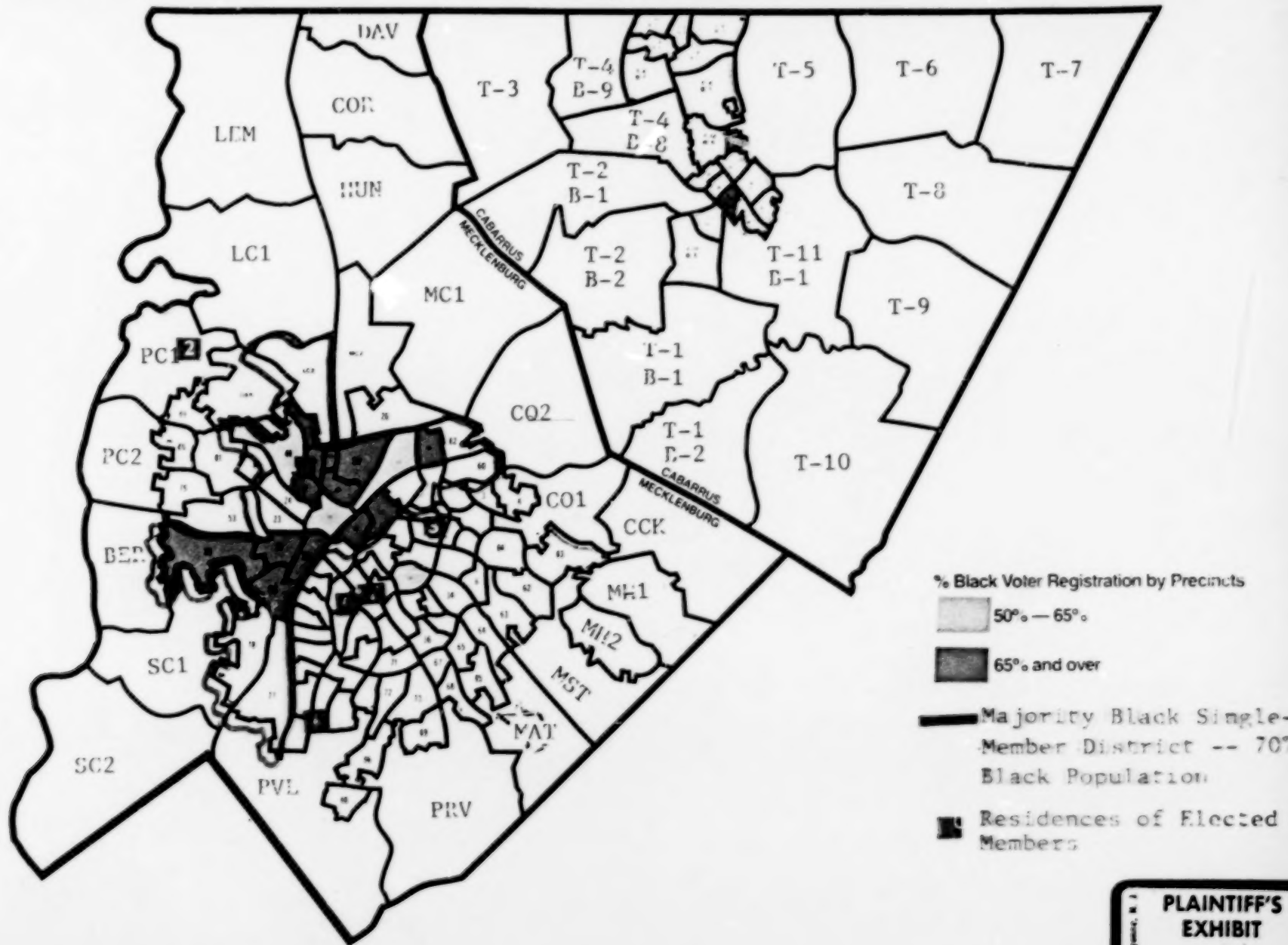
II. Overlay 1: Majority Black Single Member District

Total Population 50,062  
Total Black Population 31,376  
Percent Black Population 62.7%  
Percent Deviation 2.136%

III. Overlay 2: Residences of Elected Members, 1978-1982

1. Allen C. Barbee House - 1978, 1980, 1982  
301 E. Branch St.  
Spring Hope, NC 27882(Nash)
2. A. Hartwell Campbell House - 1978  
1709 Wilshire Blvd.  
Wilson, NC 27893(Wilson)
3. Roger Bone House - 1978, 1980  
3620 Mansfield Dr.  
Rocky Mount, NC 27801(Nash)
4. James E. Ezzell House - 1978  
3405 Winstead  
Rocky Mt., NC 27801(Nash)
5. Jeanne Fenner House - 1980, 1982  
1003 W. Nash St.  
Wilson, NC 27893(Wilson)
6. Josephus Mavretic House - 1980, 1982  
601 St. Andrew  
Tarborro, NC 27886(Edgecombe)
7. Tom Matthews House - 1982  
101 Wildwood Ave.  
Rocky Mount, NC 27801(Nash)

# Senate District 22 - Mecklenburg/Cabarrus Counties 4 Members



PLAINTIFF'S  
EXHIBIT  
9(a)  
Gingles

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LEGEND FOR MAP OF SENATE DISTRICT 22

I. Base Map: Senate District 22 - Mecklenburg/Cabarrus Counties-  
4 Members

Total Population	490,165
Total Black Population	119,110
Percent Black Population	24.3%
Percent Deviation	4.1705%

II. Overlay 1: Majority Black Single Member District

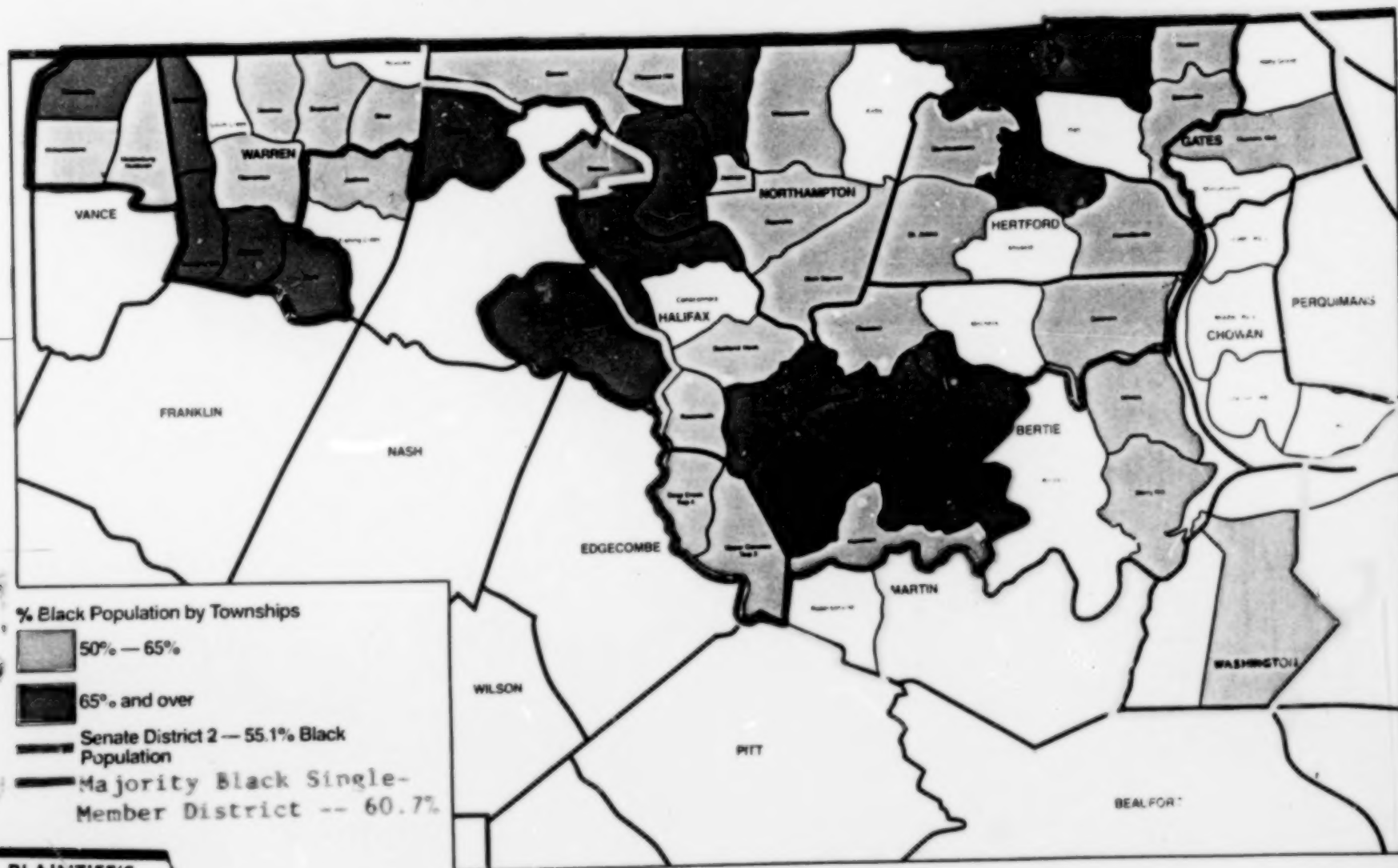
Total Population	117,602
Total Black Population	83,228
Percent Black Population	70.77%
Percent Deviation	-.028%

III. Overlay 2: Residences of Elected Members, 1978-1982

1. Fred Alexander Senate - 1978  
2140 Senior Dr.  
Charlotte, NC 28216
2. Craig Lawing Senate - 1978, 1980, 1982  
Mount Holly-Huntersville Rd.  
Charlotte, NC 27216
3. Jim McDuffie Senate - 1978, 1980  
1800 Eastway Dr.  
Charlotte, NC 28205
4. Carolyn Mathis Senate - 1978, 1980  
7111 Hopeton Rd.  
Charlotte, NC 28210
5. Cecil Jenkins Senate - 1980, 1982  
670 Knollcrest Dr.  
Concord, NC 28025(Cabarrus)
6. Ben Tison Senate - 1982  
1200 Queens Rd.  
Charlotte, NC 28207
7. Ken Harris Senate - 1982  
1901 Providence Rd.  
Charlotte, NC 28211



# Senate District 2 1 Member



PLAINTIFF'S  
EXHIBIT  
10(a)  
Gingles

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LEGEND FOR MAP OF SENATE DISTRICT 2

I. Base Map: Senate District 2 - 1 Member

Total Population	120,731
Total Black Population	66,522
Percent Black Population	55.1%
Percent Deviation	2.6316%

II. Overlay 1: Majority Black Single Member District

Total Population	116,714
Total Black Population	70,873
Percent Black Population	60.7%
Percent Deviation	-.7829%



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IN THE  
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OCTOBER TERM, 1985

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 No. 83-1968  
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*Appellants,*

v.

RALPH GINGLES, *et al.*,  
*Appellees.*

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 On Appeal From The United States District Court  
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**APPELLANTS' REPLY BRIEF**

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IN THE  
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**On Appeal From The United States  
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---

**APPELLANTS' REPLY BRIEF**

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The Appellees, in support of the opinion of the district court, have advocated an interpretation of amended Section 2 of the Voting Rights Act which is divorced completely from the statutory language and, in large part, from the legislative history as well. The Appellees' most fundamental error is their assumption that proof of the "Senate factors" constitutes proof of a Section 2 violation. Even under this erroneous interpretation of the statute, in order to rationalize



the decision of the district court, the appellees must labor to explain away the electoral success of blacks in all the challenged districts in 1982, obscure their significant success prior to 1982, and champion a definition of racially polarized voting that would condemn the voting behavior in virtually every jurisdiction in this country in local, state and national elections.

**I. Proof of the "Senate factors" does not constitute proof of a violation of Section 2**

Subsection (a) of amended Section 2 states that, "[n]o voting . . . practice shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color . . ." 42 U.S.C. § 1973(a). In Subsection (b), Congress specifies that the right to vote has been abridged or denied when racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus the ultimate issue in a Section 2 case is does the challenged practice (*e.g.*, use of multi-member districts) result in unequal electoral opportunity that can be remedied by eliminating the practice.

The Appellees and the district court, however, read subsection (b) in a vacuum and thereby eliminated the obvious statutory requirement that there be a causal relationship between the challenged practice and the alleged inequality of electoral opportunity. This disassociation of subsection (b) from subsection (a) makes it possible for the Appellees to proceed with their basic proposition that proof of the existence of the Senate factors conclusively establishes that blacks have less opportunity than whites to participate in the political forum and determine election outcomes.

This basic conception of Section 2 is embodied in the Appellees' statement that the Senate Report "specified a number of factors the presence of which, Congress believed, would have the effect of denying equal opportunity to black voters." Appellees' Brief at 16 [hereinafter App. Br.] See also, App.Br. 32, App.Br. 44, App.Br. 101. Congress did not outlaw the items listed on pages 28-29 of the Senate Report nor did it devise Section 2 as a punishment for those jurisdictions in which those factors existed. The issue is not whether these Senate factors exist or even whether they have a discriminatory effect. They are not elements of a statutory criminal offense or a common law tort where proof of the elements establishes liability. The Senate Report specifically states that "[i]f as a result of the challenged practice" plaintiffs do not enjoy equal electoral opportunity, then there is a violation of the statute. S.Rep. No. 417, 97th Cong., 2d Sess. at 28 [hereinafter S.Rep.]

Reliance on evidence such as substandard housing and infant mortality diverts the district court's attention from the real issue. In his dissent from this Court's summary affirmance in *Mississippi Republican Executive Committee v. Brooks*, 105 S.Ct. 416 (1985), Justice Rehnquist noted that even where the lower court correctly found that the Senate factors were present, it could be a total non sequitur to conclude that past discrimination and its present effects "resulted" in "dilution" of minority voting strength through the adoption of the redistricting plan in question." 105 S.Ct. at 423 (emphasis in original). Justice Rehnquist further wrote:

To the extent that less blacks vote due to past discrimination, that in itself diminishes minority

voting strength. But this occurs regardless of any particular state voting practice or procedure. . . . It is obvious that no plan adopted by the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. 105 S.Ct. at 423.

In the present case, the record shows that in 1982 the challenged multi-member structures elected a total of five black legislators.<sup>1</sup> Two black candidates, both running for public office for the first time in 1982, came very close to winning, demonstrating the potential for blacks to win more than a proportionate number of seats.<sup>2</sup> The single member districts ordered by the court, on the other hand, guarantee the election of six blacks from these districts and virtually assure that no more than seven blacks will be elected. These statistics demonstrate that not only were the court's findings on the Senate factors largely irrelevant to the question of equal access, but also that the multi-member districts could not have been the cause of whatever inequality of opportunity the court thought existed.

It is undisputed, for example, that the median income of blacks in the challenged districts is lower than that of whites. This problem, however, is endemic to the entire United States and nothing in the record demonstrates a relationship between this eco-

<sup>1</sup>Forsyth County: 2 black representatives; Durham County: 1; Wake County: 1; Mecklenburg County: 1.

<sup>2</sup>Mecklenburg County: Jim Richardson finished ninth in a race for 8 seats, 250 votes behind the 8th place winner; Mecklenburg-Cabarrus Senate District: James Polk ran 5th in a race for 4 seats.

nomic disparity and multi-member districts. The elimination of at-large elections will not as Justice Rehnquist aptly wrote "subtract one jot or tittle" from this socio-economic situation. *See also, Collins v. City of Norfolk*, 768 F.2d 572, 575 (4th Cir. 1985).

The Senate factor analysis advocated by the Appellees sheds little light on the ultimate issue of whether the multi-member districts result in unequal electoral opportunity. Most of the factors are simply too remote in time to reveal anything about the political process today. Indeed, the factor analysis tends to count against the state 9 times *one* single fact: in the past nearly every jurisdiction in the nation discriminated, to some extent, against its black citizens. Using this analysis, *any* electoral practice challenged in any Southern jurisdiction would be found in violation of section 2. Indeed, the single member districts ordered as a remedy by the district court could be successfully attacked today on precisely the same record amassed below. In such a case the theory undoubtedly would be that, based on the totality of circumstances (*i.e.*, the Senate factors) single member districts restrict the influence of black voters and limit their potential to elect more than their proportional share of legislators. Using the analysis advocated by the Appellees the court would be compelled to find a violation of Section 2.

The Appellees' analysis is further flawed by their assumption that multi-member districts are at least presumptively violative of Section 2. *See App.Br.* at 2, 3, 20, 25. It is axiomatic that multi-member districts are not *per se* illegal. *White v. Regester*, 412 U.S. 755, 765 (1973); S.Rep. at 33. Moreover, the appellees contend that single shot voting is inherently



dilutive of black voting strength. App.Br. 59. This argument loses much of its force in light of Congress' position expressed in the Senate Report that prohibitions against single shot voting are indicative of vote dilution. See S.Rep. 29. The Appellees, however, want the Court to count against the State both the fact that blacks could not single shot in all elections 15 years ago, and the fact that they can today.<sup>3</sup> Neither blacks nor any other racial or political minority group are compelled to cast single shot votes in the challenged multi-member districts. All citizens are free to vote for a full slate, for one candidate or for some number in between. The votes of black citizens are not diluted simply they chose on the basis of race to concentrate their votes on one candidate. Nothing in the record supports the Appellees' inference that blacks must single shot in order to elect legislators responsive to their needs. On the contrary, black political organizations regularly endorse white democratic candidates because they represent the interests of the black community. R.454-55, 464-65, 638, 855, 1234-36.

If single shot voting is inherently dilutive, the Appellees have gained nothing by virtue of their victory below. Under the court-ordered plan, blacks in Durham, Forsyth, Mecklenburg, and Wake Counties are

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<sup>3</sup>North Carolina enacted an anti-single shot voting law for local elections in specified counties and municipalities in 1955. It was enforced until it was declared unconstitutional in 1972 in *Dunston v. Scott*, 336 F.Supp. 206 (E.D.N.C. 1972). It has not been enforced since 1972. At least since 1915, North Carolina has not had an anti-single shot provision for nomination or election of candidates for the North Carolina General Assembly. Stip. 91.

segregated into single member districts where they have no choice but to cast one vote and affect one election outcome.

Finally, the Appellees' interpretation of Section 2 leads to their contention that a finding of a violation of the statute is a factual conclusion subject to Rule 52. App.Br. 16. Appellees rely on *Anderson v. City of Bessemer City*, 105 S.Ct 1504 (1985), to support their position. *Anderson*, however, reiterates the basic holding of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) that a district court's finding of discriminatory intent is a factual finding subject to Rule 52. If Section 2 required no more than proof of the Senate factors, then arguably a finding of dilution might be subject to Rule 52. The ultimate issue in this case, however, is whether multi-member districts result in less opportunity for blacks than whites to participate in the political process and to elect candidates of their choice. This is a mixed question of law and fact which requires the court to reach a conclusion by applying a rule of law to a particular set of facts. This Court has held in a variety of situations that such a determination is legal, not factual. See *Bose Corp v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949 (1984). Thus the "clearly erroneous" standard under Rule 52 does not apply to the case at bar.

## II. The Election of Minority Candidates Is a Recognized Indicator of Access to the Political Process.

The Appellees contend that the election of "some" minority candidates does not conclusively establish the existence of equal political opportunity. They proffer this argument in order to discount the significance of the results of the 1982 elections. In 1982, Durham



County, a 3 member district, which has a black voting age population of 33.6%, elected 1 black representative. Forsyth County, a 5 member district, which has a black voting age population of 22% elected 2 black representatives. Mecklenburg County, an 8 member district with a black voting age population of 25% elected 1 black representative and a second black candidate finished 9th, 250 votes behind the 8th place winner. In Wake County where the black voting age population is 20%, 1 black representative was elected to a 6 member delegation. In the Mecklenburg-Cabarrus Senate District a black candidate running for his first public office, finished 5th in a race for 4 seats. Obviously, proportional representation or better in 3 districts and near proportionality in the other 2 districts in question is significantly more than the "some" or "token" success described by the Appellees.

The Appellees insist that the language of Section 2 supports their theory that the 1982 elections do not count. The portion of subsection (b) on which the Appellees rely states as follows:

The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This was included in the Dole compromise as a substitute for language in the House version which stated that "[t]he fact that members of a minority group have not been elected in numbers equal to the

group's proportion of the population shall not, in and of itself, constitute a violation of this section." H.R. Rep. 97-227 97th Cong., 1st Sess. 48 (1981). The House language gave rise to a great deal of concern in the Senate that the lack of proportional representation plus a mere scintilla of other evidence would be sufficient to establish a violation. *See, e.g.* 1 Senate Hearings 516 (statement of Sen. Hatch); *id.* at 1438 (testimony of Prof. Irving Younger). Senator Dole explicitly stated that the purpose of this compromise language was to ensure that the statute would not be construed to establish a right to proportional representation and that underrepresentation would not tend to establish a violation where the totality of circumstances demonstrated equal access. S.Rep. 194 (statement of Sen. Dole).<sup>4</sup>

The Appellees incorrectly assume that the language of the disclaimer is symmetrical. They reason that if lack of proportional representation does not establish unequal access to the process, then achievement of proportional representation does not establish equal access to the process. The Senate Report, however, directly states:

*While the presence of minority elected officials is a recognized indicator of access to the process, the "results" cases make clear that the mere*

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<sup>4</sup>"The language of the subsection explicitly rejects as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive." S.Rep. 194.

combination of an at-large election and lack of proportional representation is not enough to invalidate that election method. S.Rep. 16 (emphasis added)

The Appellees further rely on *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) because, the Appellees claim, "in that case the court ruled for the plaintiffs despite the fact that blacks had won two-thirds of the seats in the most recent at-large election." App.Br. 55 This statement badly misrepresents the facts of the case upon which they rely. In *Zimmer*, the plaintiffs challenged the at-large election of a 9 member school board in East Carroll Parish where blacks constituted 59% of the population. The district court held for the parish. Subsequent to issuance of the district court's opinion blacks won 2 of 3 school board seats up for election in 1972 under the staggered term at-large system. The Court of Appeals on rehearing en banc reversed the decision declining to consider the 1972 election results because they were not part of the record. The *Zimmer* Court did not, as Appellees claim, rule for the plaintiffs despite black electoral success. The electoral success of blacks in East Carroll Parish was not dispositive because it was not part of the record.

Likewise, all the other cases cited by the Appellees fail to support their claim that electoral success of blacks is not dispositive of the issue of equal access. In *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984) 1 black had been elected to county office in the history of the county. In neither *Kirksey v. Board of Supervisors of Hinds County*, 554 F. 2d 139 (5th Cir. 1977) nor *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951

(5th Cir. 1978) had any blacks been elected to county office since the formation of the county. In *Cross v. Baxter*, 605 F.2d 875 (5th Cir. 1979) 1 black had been elected to the Moultrie City Council, but he was defeated in his bid for reelection. In *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975) there had been 1 black alderman in the town's history, but he was elected in 1968 when a popular white candidate withdrew from the election too late to have his name removed from the ballot. His name diverted so many white votes that a black won by a "stroke of luck." 515 F.2d 622. Finally, in *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) the only 3 minority candidates to be successful were slated and controlled by the white slating organization. None of these situations is comparable to the facts of the present case where blacks have been consistently successful over a period of time and have achieved proportional representation in 3 of 5 challenged districts.

The Appellees further attempt to belittle the success of black candidates by comparing the statewide black population percentage with the racial composition of the entire General Assembly. App.Br. 2, 70, n. 74. This statistic is absolutely irrelevant to the present lawsuit. The Appellees challenged specific districts—they did not attack the statewide apportionment. Five districts are presently at issue: the House districts in Durham, Forsyth, Mecklenburg and Wake Counties and the Mecklenburg-Cabarrus Senate district. The appropriate comparison is on a district by district basis. *White v. Register*, 412 U.S. 755 (1973) (vote dilution cases require an "intensely local ap-



praisal.") The Appellees' statement that a 10% of the Legislature is black while 22% of the statewide population is black, might have some plausible relevance in an action challenging the legislative districts statewide. It has none here.

Contrary to the Appellees' representations, the 1982 election was not such a dramatic turn around that one might conclude that the results were an aberration.<sup>5</sup> Black candidates in the districts in question have enjoyed considerable success since the early 1970s. *See* Stips. 114-173. In Durham County, which is one third black, for example, one black has been elected to its three member delegation in every election since 1973.

Over the past 10 years blacks have consistently achieved substantial electoral success in the challenged districts. The Appellants do not rely on a one-time victory by a "stroke of luck" to demonstrate equal electoral opportunity. Rather, the record shows that over the long run, the process turns out fair results.

### III. Racially polarized voting has legal significance when it operates consistently to defeat black candidates because of their race.

The Appellees contend that racially polarized voting occurs whenever blacks as a group vote differently

<sup>5</sup>The court "concluded" neither that the results of the 1982 election were an aberration, nor that the pendency of this litigation worked an advantage for blacks. The Appellees state several times in their brief that whites voted for blacks in 1982 only to defeat this lawsuit. (*See* App.Br. at 9, 17). They can cite nothing in the record to support this statement. They refer instead to the footnote in the district court's opinion in which the court merely observed that the inferences made on this topic were inconclusive. *See* J.A. 39, n. 27.

than whites as a group. App.Br. 72 Using this standard, every election in this country, including presidential elections, would qualify as racially polarized. The Senate Report, however, without actually defining polarized voting, states that it has significance in a Section 2 case when "race is the predominant determinant of political preference." S.Rep. at 33.<sup>6</sup> Appellees' regression analysis failed to prove that race is the predominant or even a dominant determinant of political preference.

The bivariate regression analysis advocated by the Appellees' expert and accepted by the court, does not prove that race is determining election outcomes.<sup>7</sup> A

<sup>6</sup>*See also, Terrazas v. Clements*, 581 F.Supp. 1329, 1352 (N.D. Tex. 1984) ("ethnicity of the candidate or the electorate determines the outcome of political events"); *Jordan v. Winter*, No. GC82-80-WK-O (N.D. Miss. April 16, 1984) (majority of voters choose their preferred candidates on the basis of race); *Cross v. Baxter*, 604 F.2d 875, 800 n.8 (5th Cir. 1979) (where "race plays. . . part in voters' choices"); *Political Civil Voters Organization v. City of Terrell*, 565 F.Supp. 338, 348 (N.D. Tex. 1983) ("Racially polarized voting occurs when race is a predominant factor and influence in voter choice"); (*Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) ("The inquiry is whether race or ethnicity was such a determinant of voting preference"); *U.S. v. Marengo Co. Comm.*, *supra*, 731 F.2d at 1567 ("race is the main issue in Marengo Co. politics"); *Lee County Branch NAACP v. City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984) (quoting from *Jones v. City of Lubbock*, *supra* at 234).

<sup>7</sup>Appellees argue that the Appellants did not contest the adequacy of their expert's methodology in the district court. This is simply incorrect. The Appellants' expert testified that although bivariate regression analysis was commonly used in vote dilution cases, it was inadequate because it failed to control for all the other obvious variables such as age, incumbency, and



regression analysis is a device which measures relationships: it provides quantitative estimates of the effects of different factors on a variable of interest. *See* 80 Col.L.Rev. 702 (1989). However, the regression analysis retains the properties associated with it only if one has in fact included all the variables likely to have an effect on the dependent variable. *Id.* at 704. In other words, the regression model must mirror reality. In Dr. Grofman's model all candidates are fungible but for the distinguishing characteristic of race. In reality, however, candidates differ on the issues, they live in different neighborhoods, they belong to different political parties, espouse a variety of religious beliefs, and have vastly different educational backgrounds. If these variables were in fact determining, to some extent, election outcomes, the introduction of them into the regression model could significantly reduce the value of the correlation coefficients derived for race. *See, McCleskey v. Zant*, 580 F.Supp. 338, 362 (N.D. Ga. 1984), *aff'd*, 753 F.2d 877 (5th Cir. 1985). Moreover, the Appellees' argument that a multivariate regression analysis requires vote dilution plaintiffs to prove the intent of the voters cannot withstand even cursory examination. Multivariate analysis measures precisely the same thing as a bivariate regression: the *relationship*, in this instance, between election outcomes and a given variable. It does not purport to discover motives. It merely ensures that the relationships predicted by the model will have a certain validity because the model is based on reality.

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placement on the ballot. R. 1387-89. In addition, the Appellees' expert was cross-examined on his failure to test for any other variable but race. R. 177.

According to the Appellees the district court found polarized voting when "a substantial enough number of white citizens do not vote for black candidates, so that the polarization operates, under the election method in question, to diminish the opportunity of black citizens to elect candidates of their choice." App.Br. 72. Even if the court had developed such a standard, which it did not, it would not support a finding of polarized voting in this case. In the 1982 elections the most recent and therefore most reliable indicator of current voting trends, blacks enjoyed a higher success rate than whites. In Forsyth County, for example, 11 candidates ran in the democratic primary: 9 whites and 2 blacks. Of these, 5 were successful: 3 whites and 2 blacks. *See* Pl. Ex. 15(e), R.85, 112. In the general election, 8 candidates ran for the 5 seats: 6 whites and 2 blacks. *See* Pl. Ex. 15(f), R.86, 112. Of these 3 whites and 2 blacks were successful. *Id.* Thus in the democratic primary whites had a 33% success rate while blacks had a 100% success rate. In the general election, the whites had a success rate of 50% while that for blacks was again 100%. Similarly in Wake County 5 of 14 whites were successful in the democratic primary while the only black candidate also prevailed. *See* Pl. Ex. 17(d) R. 85, 112. In the general election, where 5 out of 10 whites lost, the 1 black candidate won. *See* Pl. Ex. 17(e), R. 86, 112. In Durham and Mecklenburg Counties as well, blacks have as good or better rates of success than white candidates. *See* Pl. Ex. 14c, R. 85, 112; Pl. Ex. 14(d), R. 86, 112; Pl. Ex. 16(e), R. 85, 112; Pl. Ex. 16(d), R. 86, 112. It is obvious that black voters in the challenged districts do not, as a result of polarized voting, have less opportunity than whites to elect candidates of their choice.

**CONCLUSION**

For the reason stated herein and in Appellants' Brief, the decision of the United States District Court below should be reversed.

Respectfully submitted,

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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

\_\_\_\_\_  
LACY H. THORNBURG, *et al.*,  
*Appellants*,

v.

RALPH GINGLES, *et al.*,  
*Appellees*.

\_\_\_\_\_  
On Appeal from the United States District Court  
for the Eastern District of North Carolina

\_\_\_\_\_  
**BRIEF OF AMICUS CURIAE  
THE WASHINGTON LEGAL FOUNDATION  
IN SUPPORT OF APPELLANTS**

\_\_\_\_\_  
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## QUESTIONS PRESENTED

1. Whether the Voting Rights Act requires states to devise election districts and procedures which, wherever the concentration of minority voters is sufficiently large, will enable minorities to dictate election outcomes if they adhere to minority bloc voting.

2. Whether the district court in this case relied excessively on a Senate Judiciary Committee Report's pronouncements as to the meaning of Section 2 of the Voting Rights Act, to the exclusion of the language of the statute itself.

3. Whether the failure of non-minority citizens to vote in sufficient numbers for minority candidates in a given jurisdiction may constitute grounds for holding that jurisdiction in violation of Section 2 of the Voting Rights Act.

4. Whether the district court erred in holding that there is a degree of polarized voting sufficient to sustain a violation of the Act whenever the results of a district's elections would differ depending upon the race of the voters whose votes were counted.

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On Appeal from the United States District Court  
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BRIEF OF AMICUS CURIAE  
THE WASHINGTON LEGAL FOUNDATION  
IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF or Foundation) is a national nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members located throughout the United States, including in the State of North Carolina, whose interests the Foundation represents.

This brief is filed with the written consent of all parties.

WLF focuses its litigation efforts on cases of nationwide significance affecting the liberties and values of its members. The Foundation has been especially active in cases challenging misguided and overbroad applications of federal civil rights laws. For example, WLF has filed *amicus* briefs with this Court in such cases as *Memphis Firefighters v. Stotts*, 104 S.Ct. 2576 (1984); *General Building Contractors Association, Inc. v. Pennsylvania*, 102 S.Ct. 3141 (1982); and *United Steelworkers v. Weber*, 444 U.S. 193 (1979). In these cases, WLF has consistently pressed the view that the civil rights laws provide legal protection for *all* Americans and cannot be invoked to justify reverse discrimination or exacting reparations from any class of citizens.

In this case, WLF seeks to protect the interests of its members against a fundamental distortion of the federal Voting Rights Act. The decision on appeal here—and numerous other federal decisions of similar thrust—purports to guarantee preferred minority groups the right to demand “safe” election districts allowing them to dictate election outcomes through racial bloc voting for minority candidates. In so holding, the district court would mandate a form of proportional representation by race which Congress expressly rejected in the 1982 VRA Amendments.

Even more disturbingly, the decision elevates the commonplace phenomenon of “polarized voting” to a pivotal role in determining whether state redistricting plans violate Section 2 of the VRA. After defining that concept in terms broad enough to apply virtually everywhere, the district court held that the persistence of polarized voting may condemn a state or locality to perpetual non-compliance with the VRA.

The court’s interpretation of Section 2 in this case thus entails an ominous threat to the voting autonomy of nonminorities in countless jurisdictions; unless they

eliminate polarized voting (i.e., the common situation where whites tend to vote differently than blacks in relation to a candidate’s race or his position on racial issues) by voting compliantly for any minority candidate who appears on the ballot, their local election systems can be invalidated and enjoined by federal courts.

WLF’s brief will uniquely focus on the foregoing concerns. In the briefs filed prior to the noting of probable jurisdiction, neither the North Carolina appellants nor the United States as *amicus curiae* challenged the very validity of polarized voting as an indicator of Section 2 violations. This brief does so. Thus, WLF will present significant arguments which no existing party to this case is likely to press.

#### STATEMENT OF THE CASE

In the interests of brevity, the *amicus curiae* adopts the statement of the case set forth in the brief of the North Carolina appellants.

#### SUMMARY OF ARGUMENT

1. The district court misapplied Section 2 of the Voting Rights Act (“VRA”) in striking down the North Carolina redistricting plans. The court inexplicably disregarded the convincing and dispositive proof that blacks in all the challenged districts had achieved effective access to the political process through demonstrated success at the polls by black candidates. It erroneously assumed that the VRA requires that, whenever the state’s minority population pool is large enough, some election districts must be fashioned so that minority voting blocs will always be able to dictate election results and assure the election of minority candidates. The court further erred in resting its decision upon the one-sided views of a non-controlling portion of the legislative history of the 1982 VRA amendments, rather than upon the language of the statute itself.

2. The court's decision was based upon its erroneous view that the persistence of racially polarized voting outweighs such positive evidence as proven black access to key elected posts in determining whether there is a Section 2 violation. In ruling that a district must eliminate polarized voting to be sure of compliance with the VRA, the court unconstitutionally penalizes a local government simply because its citizens refuse to conform their voting behavior to the ideological predilections of a federal court. Further, even if polarized voting were a valid litmus test for VRA compliance, the court applied a grossly over-inclusive definition of the concept which goes much farther than the Act's standards of equal access and equal opportunity require. The district court's interpretation and application of the polarized voting factor is ultimately incompatible with the constitutional right of all citizens to vote as they please, for any reason.

### ARGUMENT

#### Preliminary Statement

This case involves a fundamental and dangerous distortion of the principles which originally motivated the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973 (hereafter referred to as "VRA" or the "Act").

The purpose of the VRA was to guarantee to all Americans, regardless of race, the right, the opportunity, and the freedom to vote for the candidates of their choice.

Notwithstanding the laments of those who thrive by cultivating grievances, the VRA has succeeded. Black voter registration and black voting have grown enormously since 1965, and in an increasing number of jurisdictions the percentage of blacks registered to vote and turning out to vote now exceeds that of whites.<sup>1</sup> Poll

<sup>1</sup> See, e.g., *Collins v. City of Norfolk*, 605 F.Supp. 377, 385 (E.D.Va. 1984) (showing significantly higher rates of voter registra-

taxes, literacy tests, and other obstacles to black political participation and voting have all been dismantled. Blacks are running for and capturing elective offices in unprecedented numbers throughout the Nation—including in the Deep South.

But some litigious elements are not content with equal access to the political process and equal opportunity to vote for the candidate of one's choice. Encouraged and fomented by sweeping court interpretations of the 1982 amendments to the VRA, the appellees and others are now claiming a "right" that was never contemplated by Congress in passing that legislation: the mandatory formation of "safe" minority election districts wherever a minority population base is large enough to allow for such districts to be devised.

The decision on appeal here adopts that same distorted approach to the curiously evolving judicial concept of "voting rights". It holds that election districts must be endlessly shaped and reshaped until they at last produce a sufficiently commanding majority of "minority" voters. Moreover, it places dispositive significance on the misleading and misunderstood concept of "polarized voting" in deciding whether a jurisdiction is in violation of the VRA. Under the district court's view, only those jurisdictions where a majority of white voters consistently vote for black candidates (whatever their views or qualifications) can avoid the stigma of "polarized voting" and a judicial determination of non-compliance with the VRA.

Neither the VRA nor its 1982 amendments authorized the courts to dictate the fashioning of "safe" districts for minorities, or to condemn jurisdictions for violating the

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tration and turnout among blacks than among whites in Norfolk, Virginia.) In the 1982 Congressional elections, blacks turned out to vote at a higher rate than whites in nine states. See *National Journal, Election '84 Handbook*, p. 2203 (Oct. 29, 1983).



VRA merely because the majority of white voters in those jurisdictions have not generally voted for black candidates. Yet that is *exactly* how the court below has applied the VRA to the North Carolina communities at issue in this case.

This Court should emphatically reverse the district court's decision and thereby prevent the VRA from being used to perpetuate racial division at the polls for years to come.

**I. THE DISTRICT COURT ERRED IN INTERPRETING THE VOTING RIGHTS ACT AS THOUGH IT GUARANTEES MINORITIES "SAFE" DISTRICTS ENABLING THEM TO CONTROL ELECTION OUTCOMES BY RACIAL BLOC VOTING**

**A. The Court Improperly Discounted a Proven Record of Minority Political Access and Election Success**

In holding that the North Carolina redistricting plans violated Section 2 of the Voting Rights Act ("VRA"), the district court completely lost sight of that legislation's proper objective.

The VRA does not compel the creation of electoral districts or systems which will allow minority bloc voting to dictate the outcome of elections wherever there are sufficient raw numbers of minorities from which to fashion such districts. Rather, the Act requires only that electoral districts must not be designed to prevent minorities from enjoying *equal access* to the political process and an *equal opportunity* to elect representatives of their choice. 42 U.S.C. Sec. 1973(b).

Under that legitimate standard, the challenged North Carolina districts easily pass muster. The record contains comprehensive evidence proving that minority voting has had a telling effect on the political power structure and that black candidates have enjoyed substantial success in key election races. J.S. App. 34a-37a; 47a.

But the District Court did not apply the "equal opportunity" standard as set forth in the statute. Instead, it applied a standard that can only be satisfied if the redistricting plan essentially *guarantees* that minority candidates will be elected in proportion to the minority share of the population. Yet Congress explicitly rejected such a standard in amending Section 2, 42 U.S.C. Sec. 1973(b). And the courts have since made it clear that "no group is entitled . . . to have its political clout maximized." *Seamon v. Upham*, 536 F.Supp. 931, 945 (E.D. Tex. 1982), *aff'd sub nom Strake v. Seamon*, 105 S.Ct. 63 (1984) [emphasis added].

Various decisions have recognized that there can be no cognizable violation of Section 2 in a district where minorities have achieved substantial success in gaining access to key elective offices and political posts. *E.g.*, *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1979). A finding of consistently adverse electoral results for minority candidates is a necessary, though not a sufficient, element of a Section 2 claim under the results test. See *Seamon v. Upham*, *supra*; *Terrazas v. Clements*, 581 F.Supp. 1329 (D.Tex. 1984).

Here the districts in question are all characterized by records of proven minority access to influential elective posts. The election of black representatives to these positions demonstrates that—contrary to the district court's ruling—a "safe" black district in terms of raw population alignments is simply *not necessary* for blacks to participate effectively in the political process or to elect representatives of their choice, *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1354.

In Durham County, for instance, one of the county's three representatives to the House has always been black since 1973—even though less than 29% of Durham County's registered voters are black. J.S. App. 35a. Black representation has also been substantial, and often in *excess* of what proportional representation would

produce, on the County Commission, the County Board of Elections, and the County Democratic Party leadership. This degree of proven minority access to key political offices is in itself incompatible with a claim of unlawful vote dilution. *Dove v. Moore*, 539 F.2d at 1153-55.

The same healthy degree of access to the political process is established beyond question in the other districts here in issue. The City of Charlotte has a black mayor, even though the city population is only 31% black. *Id.* at 35a. In Forsythe County, two out of five (40%) members of the House delegation are black, even though only 22% of the county voting age population is black. *Id.* In Wake County, where only 20% of the voting age population is black, a black candidate received the highest vote total in a 15-man Democratic primary for the District House seats and was subsequently elected to the county's six-member House delegation. And two out of the eight (25%) elected District Judges in Wake County are black.

These facts are simply incompatible with the elements of a Section 2 violation under the VRA Amendments of 1982. Under the plain language of the statute, a violation can only be established by proof that:

1. The political processes leading to nomination or election are not equally open to participation by members of the complaining minority, *in that*
2. its members have less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice, *provided that*
3. there is no right to have members of a minority elected in numbers equal to their proportion in the population.

The foregoing facts confirm that blacks do enjoy full and fair access to the political processes in the challenged

districts and that they have enjoyed at least equal opportunity to elect representatives of their choice. Were this not so, it is simply implausible that the Forsythe County House delegation would be 40% black (nearly double what proportional representation would produce); that the Durham County House delegation would have been one-third black since 1973; or that the City of Charlotte would have a black mayor.

The court below, however, was wholly indifferent to this evidence of extensive black access, participation, and success in the political processes of the districts in issue. It was less concerned with the hard fact that blacks were winning major elections at all levels than it was with lamenting upon the historical consequences of "past discriminatory" practices or the abstract implications of so-called "polarized voting". And it was so preoccupied with the misbegotten notion that racial bloc voting by minorities<sup>2</sup> must be allowed to control election outcomes that it failed to recognize that blacks were *already* enjoying full and fair participation in the election processes without the divisive racial gerrymandering demanded by this decision.

**B. The District Court Erroneously Applied the Act as though It Guarantees Minorities a Minimum Share of Political Power, as Opposed to Equal Opportunity**

The District Court set an erroneous course from the outset of its decision, when it stated as follows (J.S. App. at 14a):

The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the

<sup>2</sup> It is highly revealing that the district court's approach to voting rights is premised on the view that bloc voting by racial minorities is to be expected and accommodated (i.e., by gerrymandering districts to allow such bloc voting to control elections), while bloc voting by racial majorities is considered so pernicious that it alone may give rise to a violation of the VRA. J.S. App. 14a-15a, 41a, and 47a.



interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied *the political power* to further those interests *that numbers alone would presumptively give* it in a voting constituency not racially polarized in its voting behavior. [citation omitted; emphasis added].

This statement bears careful scrutiny, for it states the critical premise for the court's ultimate decision. It is a statement that the VRA guarantees minorities the right to electoral mechanisms which will invariably maximize the impact of minority bloc voting, while it effectively condemns non-minority voters for failing to embrace minority candidates (i.e., "persistent polarization"). This is a false and unconstitutional interpretation of the VRA.

Initially, the court's statement glibly asserts that the pivotal decision in *White v. Regester*, 412 U.S. 755 (1973), had emphasized racially polarized voting as a key element of unlawful racial vote dilution. But this critical point is completely false.

The true holding of *White* is highly important to current Section 2 analysis, because the single point on which most Congressional elements agreed in passing the 1982 amendments was that they were intended to codify the principles of decision in *White v. Regester*. Yet one will search in vain for *any* mention (much less any significant mention) of polarized or racial bloc voting in *White v. Regester's* discussion of the various elements of a vote dilution claim under the VRA. See 412 U.S. at 766-67. In fact, the source of the district court's heavy reliance on the polarized voting factor was not *White v. Regester* at all, but rather the inaccurate portrayal of *White v. Regester* set forth in a controversial segment of the leg-

islative history of the Act's 1982 amendments (see Point I.D., *infra*).

More importantly, the district court interpreted Section 2 as though it compels states to devise electoral mechanisms which will guarantee the election of minority candidates by facilitating minority bloc voting. That is, if it is at all possible to fashion a district with enough blacks to always guarantee the election of the "black" candidate by their "raw numbers alone", then the court below would compel the state to do so.

That view of the VRA is invalid and unsound. As recently stated by the court in *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1359-60:

In the absence of a denial of access, or discriminatory intent, the failure to consolidate the [minority] population may constitute a less advantageous political result, *but not an unlawful result*. [emphasis added].

The court below invalidated the North Carolina re-districting plans merely because they failed to provide a perfect arrangement for preemptive racial voting by minorities. That was reversible error, because the VRA simply does not require the states to "maximize the political clout" of *any* racial, religious, or ethnic group. *Seamon v. Upham*, *supra*, 536 F.Supp. at 945. All that the Act requires is equal *access* to the political process—and the creation of "safe" minority districts is simply not a prerequisite to equal access. *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1354.

#### C. The Court Applied a Clearly Erroneous Interpretation of Illegal Vote Dilution

The overinclusive concept of illegal vote dilution relied on by the district court completely distorts the principle of equal political access which underlies the Voting Rights Act. Equal opportunity for minorities to participate in the elective process does not—*cannot*—include any re-



quirement that non-minorities must subordinate or compromise their constitutional right to vote for whomever they please, and for whatever reason. *Kirksey v. City of Jackson*, 633 F.2d 659, 662 (5th Cir. 1981); *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

Yet the district court tied its holding in this case to the following extraordinary interpretation of vote dilution under the VRA:

[T]he demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests is the linchpin of vote dilution by districting. [J.S. App. 14a-15a.]

The court made its position still clearer when, after acknowledging that blacks have made substantial progress in gaining access to political power in the North Carolina districts, it emphasized that this progress

. . . has not proceeded to the point of overcoming still entrenched racial vote polarization, and indeed has apparently done little to diminish the level of that single most powerful factor in causing racial vote dilution. [*Id.* at 47a.]

Thus, the district court repeatedly emphasized its view that the most critical component of the violations in this case—and the “single most powerful factor” in finding a vote dilution violation—was the failure (or “unwillingness”) of white citizens to vote in essentially the same way as black citizens. When one reads between the lines of the foregoing pronouncements, it is evident that the court is issuing a none-too-subtle warning to North Carolina’s white voters. The warning is that unless they start to vote for minority candidates (regardless of the candidate’s individual merit or qualities) in “substantial numbers”, the court will continue to hold that there is “racial vote dilution” in their districts. And as long as the court holds that view, it will continue to invalidate and enjoin the district’s elections.

This constitutes a profound distortion of the true goals and principles of the Voting Rights Act. The district court blithely dismissed hard evidence that blacks *do* enjoy equal access to the political/elective processes (e.g., 40% representation on House delegation of district composed of only 22% black voters) and focused instead on the allegedly culpable behavior of white voters in failing to alter their voting preferences in favor of minority candidates.

This crabbed and punitive approach to voting rights law abandons the basic element that Section 2 of the VRA can only be violated by the discriminatory practices and policies of *governments*; Section 2 cannot be violated by citizens in the exercise of their absolute First Amendment right to vote for the candidate they prefer, for whatever reason. *Kirksey, supra*, 663 F.2d at 662.<sup>3</sup> The district court’s opinion erred in failing to grasp this distinction.

#### D. The District Court Erred in Interpreting the Controversial Senate Judiciary Committee Report as Though It Were the Statute

The district court was able to reach its erroneous conclusions only by misinterpreting Section 2 of the Act. Its misinterpretation was hardly surprising, however, because the court never even *attempted* to interpret the actual language of the statute itself. Instead, it relied almost exclusively upon selected portions of a Senate Com-

<sup>3</sup> The VRA itself, 42 U.S.C. Sec. 1971(b), prohibits any form of intimidation or coercion intended to interfere with any person’s right “to vote as he may choose.” [emphasis added] But the court’s admonition that the racial majority’s “entrenched” failure to vote for minority candidates may result in a violation of Section 2 is itself a form of coercion or intimidation intended to alter white voting behavior. It is not farfetched to argue that the court’s ominous warnings could themselves violate the VRA’s prohibition of intimidation or coercion, were it not for judicial immunity.

mittee Report.<sup>4</sup> That report reflected the views of only a modest majority of the Senate Judiciary Committee, whereas the enacted statute reflected a complex compromise between a wide variety of factions in the full Senate and the full House, as well as the views of the President.

The district court's slavish adherence to the one-sided observations of the Senate Committee Report is totally unjustifiable under black letter rules of statutory interpretation—but it is understandable in one significant respect.

Only by treating the Committee Report as though it were the definitive authority on amended Section 2 could the court possibly justify its rigid application of the Report's so-called "nine factors" test (including "polarized" voting) as the definitive standard for determining violations of Section 2. See S.Rep. at 28-29. And only by placing such exaggerated reliance on the Committee Report's "nine factors" could the court find a violation in the North Carolina districts at issue. For the actual statutory language of Section 2 nowhere mentions such open-ended factors as "polarized voting", minority employment conditions, or political "responsiveness"—*and the 1982 amendments would never have passed the full Senate or been signed by the President had such controversial and divisive factors been explicitly incorporated in the statute.*

The ultimate language of the 1982 amendments to Section 2 was indeed a compromise of conflicting viewpoints. But the Senate Judiciary Committee Report does not even begin to reflect the diverse elements of that multi-partite

<sup>4</sup> S.Rep. No. 97-417, *Report of the Senate Judiciary Committee on S. 1992*, 97th Cong., 2d Sess., ordered to be printed May 25, 1982 (hereafter cited as "S.Rep."). Senators Thurmond, Hatch, Laxalt, Dole, Grassley East, and Denton all found it necessary to append "additional", "supplemental", or dissenting views to the Committee Report.

compromise. Instead, it reflects only the one-sided aspirations of a faction of Judiciary Committee Senators who favored the most expansive interpretation of Section 2 they could promulgate without killing the legislation altogether.

The earlier House-passed bill (H.R. 3112), which was subsequently introduced verbatim in the Senate by Kennedy and Mathias, had raised serious concerns that it might ultimately require proportional representation of minorities among elected officials. To eliminate these concerns, Senator Dole introduced the proviso which explicitly disclaims that the section creates any right to proportional representation.

At the Senate mark-up of the bill, Senator Dole articulated the essence of the compromise which finally resulted (S. Rep. at 223):

[T]hat is the thrust of our compromise: equal access, whether it is open; equal access to the political process, not whether they have achieved proportional election results.

Only when President Reagan signaled that the Dole substitute was acceptable to him (i.e., that he would not veto the bill if passed) did the divergent forces and factions in the House and Senate come together to enact the legislation. Since the House simply adopted the Senate-passed Dole substitute without change, there was no need for a Conference Committee—and there was no Conference Committee Report reflecting the understanding and intent of both Houses in passing the bill.

Moreover, there is no plausible basis for viewing the Senate Judiciary Committee Report—which was intensely disputed *even within that one committee* of one House—as though it reflected the consensus understanding and intent of both Houses, as well as that of the President. It simply did not. It reflected only the subjective views



of some eleven members of the eighteen-member Senate Judiciary Committee.<sup>8</sup>

But the court below approached the new statutory language of Section 2 as though it were a mere afterthought to the controversial Senate Judiciary Committee Report. More specifically, the court judged the North Carolina districts by the standards of the Senate Report rather than by the standards of the statute. This violates the first principles of statutory construction and, in itself, is clearly reversible error.

It goes without saying that committee reports are neither enacted by Congress nor signed by the President, and they simply do not have the force of law. *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1971).

In *Davidson v. Gardner*, 370 F.2d 803, 828 (6th Cir. 1967), the Sixth Circuit correctly stated the extremely limited authority of the report of a single house of Congress with respect to interpreting the resultant statute:

The House Report, in this regard, was not agreed to in the Senate Report, nor was any mention made of it in the Conference Report. *The report of a Committee of the House "does not go very far to show the intention of a majority of both houses of Congress."* *Porter v. Murray*, 69 F.Supp. 400, 402 (D.D.C. 1946).

As further stated by the Court in *Porter v. Murray*, 69 F.Supp. at 402, the report of a single committee of the Senate is distinctly "less persuasive on the issue of Congressional intent than the report of a conference committee of both Houses". *Accord*: K. Davis, *Administra-*

<sup>8</sup> It would have been a simple matter to list the "nine factors" cited by the Senate Report in the body of Section 2 itself. Why this was not done is obvious: the Senate would have never passed a bill with those highly controversial factors, and the President would never have signed it.

*tive Law Treatise* Sec. 3A.31 (1970 Supp.) at 175 ("The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.").

The same point applies here with regard to the subjective views of the group of Judiciary Committee staffers who drafted the Senate Judiciary Committee Report. The Judiciary Committee Report was simply not a consensual legislative document, and it provides a highly suspect and unreliable indicator of the intent of the whole Congress.

Confronting a similar dispute over Congressional intent and legislative history in *Hardin v. Kentucky Utility Commission*, 390 U.S. 1, 11 (1968), this Court stated:

We think . . . that the language of the Act in its final form is a compromise and that the views of those who sought the most restrictive wording cannot control interpretation of the compromise version.

Here, in the same vein, the views of those who sought the most *expansive* wording of Section 2 likewise cannot control interpretation of the compromise legislation. Yet, there can be no doubt that the Senate Judiciary Committee Report primarily reflects the views of Senators Mathias<sup>9</sup> and Kennedy—the same two senators who had originally introduced a Senate Bill which was *identical* to the far more liberal House-passed bill (H.R. 3112). Since neither the House nor the President ever approved or joined in the Senate Committee Report, it is totally invalid for courts to place such critical emphasis on its content in construing the statute. *National Association of Greeting Card Publishers v. U.S. Postal Service*, 103 S.Ct. 2717, 2731 n.28 (1983).

The court's unquestioning reliance on the nine factors listed in the Committee Report has resulted in a rigid

<sup>9</sup> It was Senator Mathias who "filed the majority views of the Committee". S.Rep. at 1.



"factor-counting" method of judgment which completely obscures the original purposes of the Act. Since the validity of the district court's decision depends on the controlling legal force of the Committee Report's "nine factors", and since those "nine factors" are neither part of the statute nor a valid statement of its meaning, the decision below should be reversed on that basis as well.

**II. THE DISTRICT COURT ERRED IN ITS CRITICAL RELIANCE ON THE FACTOR OF "POLARIZED VOTING", WHICH IS TOTALLY INVALID AS AN INDICATOR OF VOTING RIGHTS ACT VIOLATIONS**

The decision below follows a disturbing trend in voting rights cases which places all but dispositive significance on the existence of racially polarized voting. See also *United States v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364, 380-81 (5th Cir. 1984). In the *Marengo County* case, for example, the court stated that

Some authorities suggest that a finding of discriminatory result is *compelled* when plaintiffs show racially polarized voting combined with an absence of minority elected officials. [731 F.2d at 1574; emphasis added]

The district court in this case all but confirmed that the persistence of polarized voting will *always* provide grounds for finding a violation of the VRA, even where minorities have achieved considerable success in gaining important elective posts. (J.S. App. 47a). The court was explicit in holding that it views polarized voting as the "single most powerful factor" underlying violations of the VRA. *Id.*

It is painfully clear that the court's concept of polarized voting, and its application of that concept to the facts of this case, was the "linchpin" of its ruling that North Carolina had violated the Act. But this consti-

tutes an extremely dangerous and divisive interpretation of voting rights law: it requires injurious legal consequences to be imposed unless an identified class of citizens is willing to alter their voting behavior in a manner considered desirable by some federal court.

The existence of polarized voting cannot lawfully provide grounds for holding that a state or local government has violated VRA—least of all where (as here) there would be no grounds for finding a violation but for the polarized voting. At least in the United States, the manner in which the citizens of various races or ethnic groups exercise their voting franchise, individually or as groups, is utterly beyond the lawful power of a State or political subdivision to control. Even if some citizens vote with discriminatory motives, those motives cannot be imputed to the State. *Kirksey v. City of Jackson*, *supra*, 663 F.2d at 662; *Jordan v. City of Greenwood*, 534 F.Supp. 1351, 1366 (D.Miss. 1982).

Thus, it is legally and logically insupportable to allow the validity of a State's election system to depend upon how its citizens choose to vote. Yet that is *exactly* what the district court did in this case, under the rubric of "polarized voting".

**A. Polarized Voting is a Prevalent American Voting Pattern**

Given the tone of severe rebuke with which the court proclaimed that polarized voting persists in these North Carolina districts (J.S. App. 14a-15a, 47a), one would think that it constitutes some form of insidious, abnormal departure from prevailing American voting patterns. On the contrary, it would be far more accurate to recognize polarized voting for what it is: a prevailing norm in voting behavior throughout America. It therefore seems highly illogical—not to mention hypocritical—for the law to condemn a jurisdiction's election system pri-

marily because its citizens manifest the same cross-racial voting discrepancies that characterize voters nationwide.

Polarized voting means only that voters of different races, as groups, tend to vote differently from one another in relation to the race of the candidates (or in relation to the candidate's identification with minority issues). J.S. App. 38a-39a n.29; *Collins v. City of Norfolk*, *supra*, 605 F.Supp. at 377. In this case, the district court adopted the view that there is a "substantively significant" degree of polarization whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election." (J.S. App. 39a-40a).

This means that whenever a majority of black voters support a black candidate at the polls there will always be a "substantively significant" degree of polarized voting unless a majority of whites vote for the black candidate as well.

The folly and inappropriateness of relying upon this view of "polarized voting" as an index of actionable voting rights discrimination is illustrated by the voting results of the 1984 Democratic Presidential primaries.

In most of those primaries, the votes were divided between Walter Mondale and Gary Hart, who are white, and Jesse Jackson, who is black. As established by data compiled for the Joint Center for Political Studies (see Appendix A),<sup>7</sup> the Democratic Presidential primaries in every one of the thirteen states surveyed were characterized by the most extreme form of racial polarization.

In most of the primaries surveyed, Jackson received less than 5% of the white vote but over 75% of the black

<sup>7</sup> The data are taken from Thomas E. Cavanagh and Lorn S. Foster, *Election '84, Report #2, Jesse Jackson's Campaign: The Primaries and Caucuses*, Table 4 (Joint Center for Political Studies, 1985).

vote. In New Jersey, Jackson received 86% of the black vote, but only 4% of the white vote; in New York, it was 87% of the black vote, compared to only 6% of the white vote. In none of the surveyed primaries did Jackson receive as much as 10% of the white vote, or less than 50% of the black vote.

Unless this Court is prepared to declare that the white membership of the Democratic party is composed of racists from coast to coast, then there must be something else besides anti-black racial prejudice to explain the extreme statistical polarization in the 1984 primary election voting. That "something else" may well have been Jesse Jackson's total lack of government experience; his status as a practicing clergyman; his controversial "adventures" in the field of foreign affairs; or a combination of such factors. But only the most irrational analysis could conclude that the low white vote for Jackson could accurately be attributed to white racism; there were simply too many other objective factors to explain a rejection of his Presidential candidacy.

Similar considerations negate the significance of any legal conclusions drawn from the "polarized" voting patterns found to exist in this case. Black candidates who received little support from white voters may just as well have been rejected for their stands on the issues, their liberal ideology, or their personality as for their race. See *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., concurring specially).

The statistical "evidence" offered by appellees on "polarized" voting therefore fails to come to grips with an inescapable fact: white voter rejection of a black candidate can be based upon a host of factors that have nothing at all to do with race.

The 1984 Democratic primary statistics prove that even the most extreme degrees of racial polarization in



voting often bear no relationship at all to the kind of discrimination targeted by the VRA. The mere fact that overwhelming majorities of blacks vote for a given black candidate (such as Jesse Jackson) provides no grounds whatsoever to question the attitudes of whites who overwhelmingly reject the same candidate. To hold otherwise affronts both common sense and the equal protection clause. Yet the courts discredit the integrity of the white vote every time they invoke "polarized voting" to justify finding a violation of the VRA.

One could give innumerable examples of how the concept of "polarized voting" is a completely misleading indicator of conditions pertinent to genuine Voting Rights Act violations. Few elections were more racially polarized than the 1984 Presidential election; white voters overwhelmingly rejected the Mondale candidacy which black voters were all but unanimous in supporting. Yet no one could responsibly argue that this sharp divergence in political attitudes along racial lines somehow taints the validity of our Presidential election system or that it unfairly dilutes the black vote.

Moreover, even urban jurisdictions where black political power is most vigorous—Chicago, Newark, Philadelphia, Atlanta, all of which have strong black mayors—have been characterized by very high levels of racial polarization in voting.<sup>6</sup> This again undercuts the notion that polarized voting prevents effective access to the political system.

<sup>6</sup> Black candidate Harold Washington received 369,340 black ward votes but only 19,252 white ward votes in winning the Chicago mayoralty election in 1982; some 245,845 whites voted against him. *National Journal, Election '84 Handbook* 2209 (Oct. 29, 1983). The black candidates elected mayor in Newark, New Jersey, Gary, Indiana, and Cleveland, Ohio, received 96%, 93%, and 96% of the black vote, respectively, as against only 16%, 10%, and 15% of the white vote. Levy and Kramer, *The Ethnic Factor: How America's Minorities Decide Elections* (Simon & Schuster, 1972).

Polarized voting is simply a contemporary characteristic of American politics; it reflects the reality of the widely diverse political preferences which are inevitable in a multi-racial democracy. But the existence of such diversity hardly provides legitimate grounds for condemning state and local election systems.

The Act's guarantee of an equal opportunity for minorities to participate in the political process, 42 U.S.C. Sec. 1973(b), need not and cannot be construed to require any compromise of the constitutional guarantee of the freedom to vote as one pleases. More to the point, the legality of a state's election system cannot be conditioned upon a shift of white citizens' votes to black candidates which will be sufficient to satisfy the expectations of three federal judges.

#### **B. The Court Applied an Unreasonable Standard in Finding that a "Substantively Significant" Degree of Polarized Voting Existed**

Even if polarized voting could be viewed as a relevant indicator of Section 2 violations, the district court applied an unreasonable and invalid standard in finding that it existed to a critical degree in this case. The court held that a "substantively significant" degree of polarization occurs whenever the election's outcome would be different depending on whether it was held among only black voters or only white voters (J.S. App. 39a-40a).

This gives the polarization factor a scope and weight far beyond what Congress contemplated in passing the 1982 amendments. The statute itself nowhere mentions (let alone condemns) polarized voting. Even if Congress did intend for polarization to be treated as persuasive evidence of a voting rights violation, it surely had in mind something far different than the kind of unexceptionable voting patterns examined in this case. Jurisdictions where black candidates are able to attract 50% (District No. 36), 40% (District No. 39), 37% (District



No. 23), 39% (District No. 21), and 32% (District No. 8) of the white vote—see J.S. App. 41a-46a—simply cannot be characterized as pockets of culpable resistance to the aspirations of black candidacies. Yet that is *precisely* what the district court's holding says about these North Carolina districts.

As shown by the numerous successful black candidacies in these districts and elsewhere throughout the nation, the foregoing levels of white voter support are more than sufficient to give black candidates effective access to the political system.

For example, in *Terrazas v. Clements*, *supra*, 581 F.Supp. at 1352, the minority (Hispanic) candidate for mayor received 90% of the hispanic vote as compared to only 35% of the white vote. When the plaintiff's "expert" opined that this constituted significantly polarized voting for VRA purposes, the court flatly rejected his opinion. The court took the sounder view that polarized voting is only meaningful in the legal sense when it deprives the minority of equal opportunity to participate in the political process. Stressing that the Hispanics could form coalitions to gain greater political access than their raw numbers alone would give them, *id.* at 1354, the court ruled that the 90/35 variance in Hispanic/anglo voting did not constitute a legally significant degree of polarization. In sharp contrast, the court in this case considered even a 79/50 black/white variance to be a significant degree of polarization. (J.S. App. 38a-41a). See also *Collins v. City of Norfolk*, *supra*, 605 F.Supp. at 388-89 (rejecting claims of polarized voting where levels of white support for black candidates were decidedly lower than in this case).

To hold that state election districts violate the VRA merely because a majority of their white voters do not succumb to judicial pressures and submissively vote for black candidates is not merely an unlawful distortion of the VRA. When a court coerces voters to surrender

their freedom of choice in order to appease the court's threats to condemn their election system<sup>9</sup>, it violates the First Amendment-based guarantee of absolute freedom to vote as one chooses. *Kirksey v. City of Jackson*, *supra*, 633 F.2d at 662; *Anderson v. Martin*, *supra*, 375 U.S. at 402.

Under the district court's approach to polarized voting, there would be few, if any, districts in the whole United States which could pass muster under Section 2.

Consistent with the liberal view of the Senate Committee Report, the district court proceeded as though a finding of polarized voting plus one other of the "nine factors" would be enough to sustain a finding that Section 2 had been violated. J.S. App. 14a-15a and n. 13. Given that the nine factors are hopelessly broad and amorphous—e.g., "any history of official discrimination" (Factor 1)—*any* locale can easily be found guilty of at least several of them. And few American jurisdictions would not also be "guilty" of polarized voting under the district court's standards. The 1984 Democratic Presidential Primary results (not to mention the 1984 Presidential election itself) conclusively demonstrate that extreme polarized voting is manifest throughout the United States. See Appendix A.

Thus, the approach taken by the district court in this case simply proves too much. Congress cannot have intended to enact a standard for Section 2 compliance which can only be met with certainty by homogenous jurisdictions that do not have to cope with the political tensions of racial diversity. The district court's interpretation of the VRA would condemn the election sys-

<sup>9</sup> In fact, the court's own opinion shows that this phenomenon may have already occurred in North Carolina. J.S. App. 37A n.27. The notable success of black candidates in the 1982 election was ascribed to white support which was reputedly based on fear that the defeat of black candidates would adversely affect the VRA litigation.

terms of *any* jurisdiction where, for instance, conservative non-minority voters "refuse" to vote for liberal or radical candidates who happen to be black; and where candidates have the audacity to urge reduced welfare spending or to oppose forced busing (which the court would undoubtedly condemn as "overt or subtle racial appeals" under Factor 6 of the Senate Report, J.S. App. 13a).

The approach adopted by the court below does not advance valid and lawful principles of voting rights for minorities; instead, it prescribes a form of judicial tyranny over the political and voting freedoms of members of the racial or ethnic majority. This Court should emphatically and unambiguously reject the district court's decision as a profound distortion of the Voting Rights Act and an affront to the Constitution.

## CONCLUSION

For all the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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July 5, 1985

## APPENDIX A

Table 4. 1984 Democratic presidential primary voting by race.

State	Date	Blacks			Whites				
		Black per- centage of sample	Glenn	Hart	Black per- centage of sample	Glenn	Hart		
Alabama	3/13	40%	1%	1%	56%	32%	37%	1%	29%
Georgia	3/13	28	1	5	61	30	69	38	32
Illinois	3/20	25	—	4	79	17	69	45	47
New York	4/3	23	—	3	87	8	70	36	57
Pennsylvania	4/10	16	—	3	77	18	82	43	50
Tennessee	5/1	26	—	2	76	22	71	43	51
Texas *	5/5	33	—	1	83	16	56	37	50
Indiana	5/8	14	—	9	71	20	85	51	44
Maryland	5/8	24	—	2	83	13	73	35	53
No. Carolina	5/8	27	—	1	84	13	69	41	46
Ohio	5/8	19	—	3	81	15	79	50	44
California	6/5	—	—	5	78	16	—	48	40
New Jersey	6/5	—	—	2	86	11	—	38	56

**Source:** CBS/New York Times exit surveys.

- **Sample of caucus participants**

JUL 8 1985

ALEXANDER I. STEVAS,  
CLERK

No. 83-1968

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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LACY H. THORNBURG, ET AL., APPELLANTS

v.

RALPH GINGLES, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING APPELLANTS

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## QUESTIONS PRESENTED

1. Whether the district court correctly construed amended Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as invalidating certain multi-member legislative districts in which minority candidates had a proven opportunity to participate in the electoral process, on the ground that there was no guarantee that minorities would enjoy the continued electoral success guaranteed by "safe" districts.

2. Whether racial bloc voting exists as a matter of law whenever less than 50% of the white voters cast ballots for a minority candidate.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS

v.

RALPH GINGLES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING APPELLANTS

**INTEREST OF THE UNITED STATES**

On October 1, 1984, the Court entered an order inviting the Solicitor General to express the views of the United States in this case. We responded in a brief urging summary affirmance on two questions and plenary review on two others, and the Court noted probable jurisdiction on the latter two questions on April 29, 1985.

This case presents several questions concerning the proper construction of the 1982 amendment to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The United States has the primary responsibility for enforcing the Voting Rights Act and thus has a substantial interest in ensuring that the Act is construed in a manner that advances, rather than impedes, its objectives.

**STATEMENT**

1. In July 1981, as a result of the 1980 census, North Carolina enacted redistricting plans for the state's House of Representatives and Senate. In September 1981, appellees filed this suit, alleging that the plans had been

enacted pursuant to provisions of the North Carolina constitution that required, but had not received, preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. (1976 ed.) 1973c, and that the use of large multi-member districts submerged concentrations of black voters and diluted minority voting strength in violation of the Constitution and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. (1976 ed.) 1973 (J.S. App. 3a-4a).<sup>1</sup> After the plans were ultimately adopted by the state legislature,<sup>2</sup> appellees amended their pleadings to challenge five House Districts (Nos. 8, 21, 23, 26, and 39) and two Senate Districts (Nos. 2 and 22) and to conform their pleadings to the newly-amended Section 2 of the Voting Rights Act.<sup>3</sup> The "gravamen" of appellees' claim with reference to these multimember districts was that the State's plan "makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts \* \* \*" (J.S. App. 4a). The plan was in this respect claimed to violate amended Section 2 of the Voting Rights Act.

2. The case was tried before a three-judge court on the basis of extensive stipulations of fact, documentary evidence, and oral testimony (J.S. App. 8a). The court entered an order and opinion containing extensive findings on the various factors identified in the legislative history of amended Section 2 and case law as relevant to a vote dilution claim. J.S. App. 21a-51a. The court held that "it has now become possible for black citizens to be elected to all levels of state government in North Carolina" (*id.* at 37a). However, the court further held

<sup>1</sup> The state constitutional provision to which the suit referred was a provision adopted in 1968 prohibiting the division of counties for the purpose of creating electoral districts.

<sup>2</sup> The proceedings are described in our earlier brief (at 1-2).

<sup>3</sup> Only two of these districts—House District 8 and Senate District 2—were subject to and had received preclearance under Section 5 of the Voting Rights Act.

that, under the totality of the relevant circumstances, the redistricting plan in all seven challenged districts diluted minority votes in violation of amended Section 2 and enjoined elections in the challenged districts (*ibid.*).<sup>4</sup>

The district court also reviewed at length the racial demographics and voting history of each challenged multimember district.

*House District 21.* House District 21, in Wake County, elects six members to the General Assembly on an at-large basis (J.S. App. 19a). The population of the district is 21.8% black, and black voters constitute 15.1% of all registered voters (*ibid.*).<sup>5</sup> 72% of the white voting age population is registered to vote, and 49.7% of the black voting age population is registered to vote (*id.* at 24a n.22). The black population is so situated that one single-member legislative district could be drawn within the present boundaries, with a black population of 67% (*id.* at 20a). Under the challenged plan and its predecessor,<sup>6</sup> one black legislator was elected in 1980

<sup>4</sup> The district court found (J.S. App. 51a-52a) that the totality of the following circumstances, in combination with the use of large multi-member districts, diluted minority votes in each of the challenged districts: (1) "the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting," (2) "substantial to severe racial polarization in voting," (3) "the effects of thirty years of persistent racial appeals in political campaigns," (4) "a relatively depressed socioeconomic status resulting in significant degree from a century of *de jure* and *de facto* segregation," and (5) "the continuing effect of a majority vote requirement." The court also found that in creating the sole single-member district challenged—Senate District 2—the State had diluted black voting strength by fracturing the black community into two districts containing black voting minorities (J.S. App. 52a).

Subsequent proceedings are described in our earlier brief (at 3 n.1).

<sup>5</sup> The court did not make a finding for any of the districts regarding voting age population, which is the preferred measure. See *City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981).

<sup>6</sup> The challenged multi-member districts continued pre-existing districts and their apportionments (J.S. App. 19a). Thus, it is pos-



and reelected in 1982 (*id.* at 35a, 44a). In those elections, respectively, he received the votes of 31% and 39% of the white voters in the primary, and the votes of 44% and 45% of the white voters in the general election (*id.* at 44a.).

*House District 23.* House District 23, in Durham County, elects three members at-large to serve two-year terms in the General Assembly (J.S. App. 19a). The black population is 36.3% of the total, and blacks constitute 28.6% of the registered voters (*ibid.*). 66% of the white voting age population is registered to vote, and 52.9% of the black voting age population is registered (*id.* at 24a n.22). The black population is so situated that one single-member district could be drawn within the present boundaries, with a black population of 70.9% (*id.* at 20a). Under the challenged plan and its predecessor, this district has elected one black representative in every election since 1973 (*id.* at 35a). The black legislator was unopposed in the general election in 1978, and in both the primary and general elections in 1980. In 1978, he was elected with 16% of the white vote in the primary, and in 1982 he received 37% of the white vote in the primary and 43% of the white vote in the general election.<sup>7</sup> A second black candidate also garnered 26% of the white vote in the 1982 primary (*id.* at 43a-44a).

*House District 36.* House District 36, in Mecklenburg County, has an eight-member House delegation, elected at-large (J.S. App. 19a). Blacks constitute 26.5% of the district's population and 18% of its registered voters (*ibid.*). 73% of the white voting age population is registered to vote, and 50.8% of the black voting age population is registered (*id.* at 24a n.22). The black population of the district is so situated that two single-member legislative districts could be drawn that would be 66.1%

sible to evaluate the plan's dilutive impact, if any, by looking at results from more than one election.

<sup>7</sup> In the 1982 primary election there were only four candidates, two of whom were black, for three positions (J.S. App. 44a).

and 71.2% black (*id.* at 20a). Under the present plan, one black representative was elected in 1982; he is the first black citizen to be elected to the House from Mecklenburg County in this century (*id.* at 43a). He received 50% of the white vote in the primary and 42% of the white vote in the general election (*id.* at 41a).<sup>8</sup> A second, unsuccessful, black candidate received 39% of the white vote in the 1982 primary and 29% in the general election (*ibid.*).<sup>9</sup>

*House District 39.* House District 39, in a part of Forsyth County, has five at-large seats in the General Assembly (J.S. App. 19a). The population of the district is 25.1% black, and blacks constitute 20.8% of the registered voters (*ibid.*). 69.4% of the white voting age population is registered to vote, and 64.1% of the black voting age population is also registered (*id.* at 24a n.22). The black population is so situated that one single-member legislative district, with a 70.0% concentration of black voters, could be drawn (*id.* at 20a). Under the present plan, two of the five representatives elected in 1982 were black; under the predecessor plan, a black representative was elected in 1974 and reelected in 1976 (*id.* at 35a). The two black representatives elected in 1982 received 25% and 36% of the white vote in the primary election, and 42% and 46% in the general election (*id.* at 43a). One of these representatives had previously won the Democratic nomination in 1978 and 1980 (with 28% of the white vote in 1978 and 40% of the white vote in 1980), but lost the general election in those years (*id.* at 42a-43a).

*Senate District 22.* Senate District 22, in Mecklenburg and Cabarrus Counties, is a four member district (J.S. App. 19a). The population is 24.3% black, and

<sup>8</sup> There were only six white candidates for eight positions in the primary (J.S. App. 42a).

<sup>9</sup> In addition, the district court observed that a black citizen has been elected mayor of the City of Charlotte, receiving 38% of the white vote in the general election against a white Republican (J.S. App. 35a).



16.8% of the registered voters are black (*ibid.*). In Mecklenburg County, 73% of the white voting age population is registered to vote, as is 50.8% of the black voting age population (*id.* at 24a n.22).<sup>10</sup> The black population is so situated that one single-member district could be created with a 70.0% black population (*id.* at 20a). Under the present plan, no black Senator is part of the delegation; however, a black citizen was elected from 1975-1980 (*id.* at 34a). The black senatorial incumbent (Alexander) received 47% of the white vote in the 1978 primary, and 41% of the white vote in the general election; his share of the white vote dropped to 23% in the 1980 primary (*id.* at 42a). A second black candidate (Polk), running in 1982, garnered 32% of the white votes in the primary and 33% in the general election. *Ibid.*

#### INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first case in this Court to accord plenary appellate review to a trial court's finding of a violation of the 1982 amendment to Section 2 of the Voting Rights Act. That provision, enacted after an intense legislative struggle, represents a studied compromise that condemns only those electoral procedures that "result" in a denial of an "equal opportunity to participate in the electoral process." That conclusion is a matter of law, the proper conception of which must be established and assured by this Court. This ultimate determination requires delicate judgments that can hardly be reached or reviewed by any mechanical standard. If the integrity of the Section 2 compromise is to be maintained, moreover, an appellate court must assure itself not only that a trial court has considered the appropriate evidence in reaching its conclusion, but also that this evidence, taken as a whole and properly balanced, supports the trial court's answer to the ultimate question that Congress has prescribed.

<sup>10</sup> The district court did not make a finding for Carrabus County (see J.S. App. 24a-25a n.22).

The district court considered all of the evidence, but it reached an ultimate conclusion at odds with the correct legal standard. If left undisturbed, that decision means that wherever there has been discrimination in the past and some measure of racial polarization in voting in the present, district courts will be free to strike down virtually any scheme that does not—or even those that do—deliver electoral successes proportional to minority voting strength. That is not what Congress intended. Specifically, we shall argue that the trial court, by ignoring recent minority electoral successes in the districts in issue, could not reasonably have found a violation under the proper "equal opportunity to participate" standard, but rather must implicitly have sought to guarantee continued minority electoral success. Further, the court below adopted and made dispositive a definition of racial block voting that, taken literally, might justify finding this factor present in virtually any district with a racially mixed electorate and thus could justify requiring proportional representation in all such districts. Congress crafted a precise standard for intervention in the electoral process, and fidelity to that standard requires that this judgment be set aside.<sup>11</sup>

#### ARGUMENT

##### THE DISTRICT COURT ERRONEOUSLY HELD THAT THE REDISTRICTING PLAN AT ISSUE VIOLATES AMENDED SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

##### A. Amended Section 2 Guarantees Every Citizen The Right To An Equal Opportunity To Participate In The Political Process

1. The legislative background of amended Section 2 underscores the centrality of the principles noted above to the compromise enacted into that law. Amended Sec-

<sup>11</sup> We will not discuss House District 8 and Senate District 2, because appellants' challenge to the district court's conclusion as to those districts is not within the scope of the Court's notation of probable jurisdiction.

tion 2 reflects the consensus of an overwhelming majority of the Congress, reached only after an intensive and divisive debate, whether to endorse or reject the holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The product of that debate was a provision that does not require proof of racial animus to establish a violation of amended Section 2 and does not allow proof of electoral failure solely or even preponderantly to establish a violation under the Act. Congress chose an altogether different approach: As adopted, Section 2 guarantees every citizen equal access to the electoral process and thus focuses upon that process itself.<sup>12</sup>

a. Amended Section 2 originated in the 97th Congress when H.R. 3112 was introduced to extend certain features of the 1965 Voting Rights Act and to modify Section 2 of the Act because of the decision in *City of Mobile*. H.R. 3112 would have eliminated an intent standard by forbidding any jurisdiction from imposing or applying any electoral practice "in a manner which results in a denial or abridgement of the right \* \* \* to vote on account of race or color \* \* \*,"<sup>13</sup> a test claimed

<sup>12</sup> At the same time, the legislative history of amended Section 2 is complicated, variegated, and, on occasion, contradictory. The language ultimately incorporated into this provision was proposed by Senator Dole as a means of resolving a deadlock in the Senate Judiciary Committee that arose after the Senate Constitution Subcommittee had rejected the House version of Section 2. In this setting, undue emphasis must not be given to the views of any one faction in the controversy. The legislative history must be understood in terms of its dominant movement and fundamental purposes. Statements of the majority in the Senate Report, while illuminative on many issues, must be evaluated against the record established before the Congress as a whole and particularly against statements of the additional views of individual members who insisted upon and supported the compromise. The statements of Senator Dole, the sponsor of the compromise, must also be given particular weight.

<sup>13</sup> H.R. 3198, 97th Cong., 1st Sess. (1981). See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. Pt. 1, at 2 (1981) [hereinafter cited as *House Hearings*].

by its supporters to stem from *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971). Most of the discussion in the House regarding H.R. 3112 was devoted to other aspects of the bill; the proposal to amend Section 2 attracted little debate.<sup>14</sup> As passed by the House, H.R. 3112 contained the results test in the original bill and a disclaimer that numerical underrepresentation itself violated Section 2.<sup>15</sup>

b. After the House passed H.R. 3112, the Senate Subcommittee on the Constitution began hearings on two bills, one that contained the results test in H.R. 3112 (S. 3112) and one that would have retained the *City of Mobile* standard (S. 1975).<sup>16</sup> The ensuing debate focused on the proper standard for Section 2. Proponents of a results test chiefly argued that the Court's holding in *City of Mobile* insulated discriminatory practices from review because of the difficulty of obtaining evidence regarding the subjective motivations of legislators, especially when the practices in question were adopted long ago.<sup>17</sup> They proposed that the analysis should be based

<sup>14</sup> See generally Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1354-1379 (1983) [hereinafter cited as Boyd & Markman].

<sup>15</sup> The disclaimer provided: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." H.R. Rep. 97-227, 97th Cong., 1st Sess. 48 (1981) (emphasis added) [hereinafter cited as House Report]. Although he had sponsored the disclaimer, Representative Hyde later concluded that it failed to achieve its purposes. See 1 *Voting Rights Act: Hearings on S. 53, et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 407-408 (1982) (testimony of Rep. Hyde) [hereinafter cited as *Senate Hearings*]; *id.* at 886-887 (letter from Rep. Hyde to Sen. Hatch).

<sup>16</sup> Senators Kennedy and Mathias (and more than 60 co-sponsors) introduced S. 1992, 97th Cong., 1st Sess. (1981), which was identical to H.R. 3112. 127 Cong. Rec. S15694 (daily ed. Dec. 16, 1981). Senator Grassley introduced S. 1975, 97th Cong., 1st Sess. (1981). 127 Cong. Rec. S15372 (daily ed. Dec. 15, 1981).

<sup>17</sup> See, e.g., 1 *Senate Hearings* 199 (statement by Sen. Mathias); *id.* at 256, 265 (testimony of Benjamin L. Hooks, Exec. Dir.,



upon the various so-called "objective" factors identified in *White v. Regester* and pre-*City of Mobile* lower court cases applying that standard. Critics of the results test agreed, in essence, that a finding of unlawful vote dilution could and should be made on the strength of objective evidence, but were concerned with, among other things, the potentially-limitless scope of the test.<sup>18</sup> A principal concern was the implication left by the disclaimer: given its limited terms—that numerical underrepresentation of minorities would not amount "in and of itself" to a violation of Section 2—opponents of the results test maintained that proportional representation would ineluctably follow simply from proof of some additional factor identified in *White* or elsewhere.<sup>19</sup> Another major criticism was that the House version lacked a "core value" or an "ultimate or threshold criterion" other than proportional representation for evaluating vote dilution claims.<sup>20</sup> Supporters of the results test repeatedly assured its critics that it was not a mandate for

NAACP); *id.* at 290-291 (testimony of Vilma Martinez, Pres., MALDEF); *id.* at 813-819 (Prepared Statement of Armand Derfner). Another criticism was that the intent test fostered racial divisiveness by requiring a person to be branded as a racist before a violation could be found. See *id.* at 1181 (Prepared Statement of Arthur Fleming, Chairman, U.S. Comm'n on Civil Rights).

<sup>18</sup> A complete discussion of the objections to the results test is contained in the Subcommittee's Report. See S. Rep. 97-417, 97th Cong., 2d Sess. 108-111, 127-158, 169-173 (1982) [hereinafter cited as Senate Report] (Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Judiciary Comm.) [hereinafter cited as Subcomm. Report]; see also Boyd & Markman 1396-1406 (discussing Subcommittee's objections).

<sup>19</sup> See, e.g., 1 *Senate Hearings* 516 (statement of Sen. Hatch); *id.* at 229-231 (testimony of Prof. Walter Berns); *id.* at 407-408 (testimony of Rep. Hyde); *id.* at 424-432 (testimony of Prof. Barry R. Gross); *id.* at 655 (testimony of Prof. John Bunzel); *id.* at 1438 (testimony of Prof. Irving Younger). See generally Subcomm. Report 142-146.

<sup>20</sup> Subcomm. Report 137.

proportional representation,<sup>21</sup> that it was merely a means of ensuring that minorities were not effectively "shut out" of the electoral process,<sup>22</sup> and that, given the heavy burden the test placed on a plaintiff—one supporter described it as "incredibly difficult"<sup>23</sup>—the test would invalidate only those electoral practices that denied minorities an equal opportunity to participate in the political process.<sup>24</sup> As Armand Derfner, head of the Voting Rights Project, put it, the "goal" of amended Section 2 "is to create an opportunity—nothing more than an opportunity—to participate in the political system." 1 *Senate Hearings* 821 (Prepared Statement).<sup>25</sup> Nonethe-

<sup>21</sup> See, e.g., 1 *Senate Hearings* 200 (Prepared Statement of Sen. Kennedy) ("The courts have made clear that under the standard in our bill there is no right to a quota or to proportional representation, even in the context of at large elections"); *id.* at 243 (Benjamin L. Hooks, Exec. Dir., NAACP); *id.* at 283, 287 (Memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 796 (testimony of Armand Derfner, Voting Rights Project).

<sup>22</sup> As Armand Derfner, head of the Voting Rights Project, put it, "[t]he precise proof might vary, but the essential element of proving that the racial minority was 'shut out,' i.e., denied access—not simply to winning offices but to the opportunity to participate in the electoral system—was always required [under pre-*City of Mobile* cases]." 1 *Senate Hearings* 810 (Prepared Statement); see also, e.g., *id.* at 223 (Prepared Statement of Sen. Kennedy); *id.* at 626 (testimony of David Walbert).

<sup>23</sup> 1 *Senate Hearings* 368 (testimony of Laughlin McDonald, Southern Regional Dir., ACLU).

<sup>24</sup> See, e.g., 1 *Senate Hearings* 201 (testimony of Sen. Mathias); *id.* at 223 (Prepared Statement of Sen. Kennedy) ("effectively shut out of a fair opportunity [to] participate in the election"); *id.* at 810, 819-820 (Prepared Statement of Armand Derfner).

<sup>25</sup> Other supporters of the results standard made the same point. See, e.g., 1 *Senate Hearings* 305 (Prepared Statement of Vilma S. Martinez, President, MALDEF) ("The issue then, is not proportional representation, but equal access to the political process"); *id.* at 372 (Laughlin McDonald, Southern Regional Dir., ACLU) ("What those [pre-*City of Mobile*] cases do is establish equality of access"). See also *id.* at 223 (Prepared Statement of Sen. Kennedy); *id.* at 275-276 (Prepared Statement of Benjamin L. Hooks, Pres. NAACP); *id.* at 283, 286-287 (Memorandum from Ralph G. Neas,



less, the Constitution Subcommittee rejected the House effects test in favor of the *City of Mobile* standard. 2 *Senate Hearings* 10.

c. To break the deadlock, Senator Dole, with the backing of the President, offered a compromise version of Section 2 that responded to criticisms of the effects test by introducing "additional language" incorporated from *White v. Regester* "delineating what legal standard should apply under the results test" and "clarifying that [this test] is not a mandate for proportional representation." 2 *Senate Hearings* 60 (statement of Sen. Dole); *id.* at 58-59. The most significant feature of the compromise was to modify and expand the language of the House-passed bill to ensure that "equal opportunity," not "proportional results," would be the legal test. Senate Report 193-194 (Additional Views of Sen. Dole); *id.* at 199 (Supplemental Views of Sen. Grassley). As Senator Dole put it, because his version of amended Section 2 "focus[es] on access to the process, not election results" (2 *Senate Hearings* 61-62), the question to be answered is "not whether [minorities] have achieved proportional election results," but "whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process" (*id.* at 60; see also 2 *Senate Hearings* 46 (Sen. Leahy) ("[i]t is the opportunity to participate, not the actual use of that right, which is crucial \* \* \*")). The Committee adopted Senator Dole's compromise (*id.* at 86), as did the entire Senate (128 Cong. Rec. S7139 (daily ed. June 18, 1982)). Although the Senate bill differed from the House version, the House dispensed with a conference and adopted the Senate bill (*id.* at H3846 (daily ed. June 23, 1982)).<sup>26</sup>

Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 305 (Prepared Statement of Vilma S. Martinez, Pres., MALDEF); *id.* at 706 (Memorandum from Frank R. Parker, Lawyers' Comm. for Civil Rights Under Law).

<sup>26</sup> There was little debate in the House, and, with one exception, no one disagreed with the thrust of Senator Dole's position that

2. The legislative history thus reveals that the compromise encompassed three key areas of consensus. First, there was widespread agreement that direct evidence of intent to discriminate should not be necessary to establish a violation under Section 2. House Report 29; Senate Report 193 (Additional Views of Sen. Dole). Second, during the course of the debate, a consensus—Senator Dole described it as "a unanimous consensus"—developed against permitting Section 2 claims to be based upon the inability of a group to achieve representation in proportion to its population within the jurisdiction.<sup>27</sup> Rather, members of Congress who favored<sup>28</sup> or opposed<sup>29</sup> the original results test and the compromise version of amended Section 2, as well as private supporters of the bill,<sup>30</sup> agreed that proof of minority underrepresentation

"equal access" and an "equal opportunity to participate" was the standard for amended Section 2. See 128 Cong. Rec. H3840-H3841 (daily ed. June 23, 1982) (Rep. Edwards); *id.* at H3841 (Rep. Sensenbrenner); *id.* at H3842 (Rep. Hyde); *id.* at H3846 (Rep. Butler). But see *id.* at H3844 (Rep. Lungren) (describing standard in terms of intent).

<sup>27</sup> Senate Report 193 (Additional Views of Sen. Dole); Senate Report 33; House Report 30; 128 Cong. Rec. S6647 (daily ed. June 10, 1982) (Sen. Grassley); *id.* at S6920 (daily ed. June 17, 1982) (Sen. Hatch); *id.* at S6961 (Sen. Dole); 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982) (President's signing statement).

<sup>28</sup> As Senator Kennedy explained his version: "Section 2, as amended would not make mere failure of minorities to win proportional representation a violation, even if that came as the result of at large elections. Plaintiffs would have to prove additional factors establishing that, in the total circumstances minority voters not only failed 'to win' but were effectively shut out of a fair opportunity [to] participate in the election." 1 *Senate Hearings* 223 (emphasis in original) (Prepared Statement).

<sup>29</sup> See Subcomm. Report 139-147.

<sup>30</sup> Benjamin Hooks, Executive Director of the NAACP, made this point during the Senate hearings: "I would say that—and let me be very frank—simply proven results would not be enough to trigger the mechanism of Section 2. It would only trigger it if the results were caused by some practice. Results simply trigger looking at the

was a necessary but not a sufficient element of a successful vote dilution claim, as the Court's decision in *White* and *Whitcomb* had held.<sup>31</sup> Third, both sides in the controversy agreed that the concepts of unconstitutional vote dilution developed by this Court in *White* and *Whitcomb* and as applied by the lower courts prior to *City of Mobile*<sup>32</sup> should govern amended Section 2 cases.<sup>33</sup>

Amended Section 2, as the text itself makes clear, thus focuses not on guaranteeing election results, but instead on securing to every citizen the right to an equal "opportunity \* \* \* to participate in the political process \* \* \*" (42 U.S.C. 1973). As Senator Dole, whose views, as

practices; that is all." 1 *Senate Hearings* 267; see also, e.g., *id.* at 283 (Memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 420 (Laughlin McDonald, Southern Regional Dir., ACLU) ("I do not know of a single case \* \* \* that says the mere absence of blacks from office is ever enough to violate either section 2 of the 14th or the 15th amendment. Not only are there no cases that have ever said that, but every case says precisely the opposite"); *id.* at 957 (Prof. Norman Dorsen); *id.* at 987 (Prepared Statement of Joseph L. Rauh, Jr.).

<sup>31</sup> Because the Senate endorsed this principle as well as the Court's decisions in *Whitcomb* and *White* which had enunciated it, the statement in the House report that the consistent defeat of minority or minority-backed candidates in at-large system itself would establish a violation of amended Section 2 (House Report 30-31) does not express Congress' intent. See also page 17 note 39, *infra*.

<sup>32</sup> See, e.g., *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd* on other grounds *sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); see also 1 *Senate Hearings* 1216-1226 (Appendix to Prepared Statement of Frank R. Parker, Lawyers' Comm. for Civil Rights Under Law) (collecting cases). The Court discussed these factors in *Rogers v. Lodge*, 458 U.S. 613, 619-620 n.8 (1982).

<sup>33</sup> See House Report 30 & n.104; Senate Report 27-30; *id.* at 104 n.24 ¶ 6 (Additional Views of Sen. Hatch); *id.* at 194 (Additional Views of Sen. Dole); *id.* at 198 (Supplemental Views of Sen. Grassley); 128 Cong. Rec. S6941 (daily ed. June 17, 1982) (Sen. Mathias); *id.* at S6961 (Sen. Dole); *id.* at H3841 (daily ed. June 23, 1982) (Rep. Edwards).

principal sponsor of the compromise Section 2 that passed the Congress, provide an authoritative guide to the statute's construction,<sup>34</sup> stated in explanation of his proposal, "[c]itizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress." Senate Report 193 (Additional Views of Sen. Dole). Senator Dole made the same point during the floor debate on his compromise (128 Cong. Rec. S6961 (daily ed. June 17, 1982)) and added that (*ibid.*):

[T]he standard is whether or not the political processes are equally "open," whether there is access, whether they are open in that members of a protected class have the same opportunity as others to participate in the political process and to elect candidates of their choice.

In response to a question from Senator Thurmond whether "the focus on the section 2 standard [is] on equal access to the political process or is \* \* \* on whether a minority group has achieved equal election results?" (*id.* at S6962), Senator Dole replied (*ibid.*):

The focus in section 2 is on equal access, as it should be. I thank the Senator for directing the question. I know of no one in this Chamber and I heard no one anywhere else indicate that it should be otherwise. It should be on access. Is the system open to people in Kansas, South Carolina, North Carolina, California, New York, wherever? Do they have access and an opportunity to cast their vote? It is not a right to elect someone of their race but it is equal access and having their vote counted.

Amended Section 2, Senator Dole further explained, would "[a]bsolutely not" provide any redress "if the

<sup>34</sup> See, e.g., *Grove City College v. Bell*, No. 82-792 (Feb. 28, 1984), slip op. 11; *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982). This is particularly true given Senator Dole's pivotal role in the adoption of amended Section 2 and the absence of a conference report on the Act. See *North Haven*, 456 U.S. at 527.



process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting or having their vote counted, or registering, whatever the process may include" (*ibid.*). In his view, so long as "[t]he political process leading to nomination or election [is] \* \* \* equally open to participation by members of a class of citizens without regard to race, color, or language minority" there could not be "a denial or abridgement of the right to vote under the amendment" (128 Cong. Rec. S7120 (daily ed. June 18, 1982) (colloquy between Sen. Dole and Sen. Gorton); see also *id.* at S7119 (Sen. Dole)); cf. *Whitcomb v. Chavis*, 403 U.S. at 153.

Supporters of amended Section 2 in the Senate echoed Senator Dole's understanding of his compromise amendment to Section 2. They repeatedly emphasized that the provision guaranteed "equal access"<sup>35</sup> or "an equal opportunity to participate,"<sup>36</sup> but that it did not apply where minority voters or candidates "failed to participate given an equal opportunity"<sup>37</sup> to do so.<sup>38</sup> These statements demonstrate that the supporters of Senator Dole's compromise version of amended Section 2 shared his construction of its terms. Accordingly, the central issue under amended Section 2, as all participants in

<sup>35</sup> *E.g.*, 128 Cong. Rec. S6655 (daily ed. June 10, 1982) (Sen. Boren)); accord, *id.* at S6500 (daily ed. June 9, 1982) (Sen. Stevens) ("the issue to be decided under the results test is whether the political processes are equally open to minority voters").

<sup>36</sup> 128 Cong. Rec. S6560 (daily ed. June 9, 1982) (Sen. Kennedy); *id.* at S6557 (Sen. Stevens).

<sup>37</sup> *E.g.*, *id.* at S6779 (daily ed. June 15, 1982) (Sen. Specter).

<sup>38</sup> Accord, *e.g.*, *id.* at S6647 (daily ed. June 10, 1982) (Sen. Grassley); *id.* at S6717 (daily ed. June 14, 1982) (Sen. Tower); *id.* at S6717-S6718 (daily ed. June 17, 1982) (Sen. Moynihan); *id.* at S6964 (Sen. Kennedy); *ibid.* (Sen. Heflin); *id.* at S7110 (daily ed. June 18, 1982) (Sen. Metzenbaum); *id.* at S7118 (Sen. Sasser); *id.* at S7138 (Sen. Robert Byrd). As Senator Robert Byrd put it, "[t]he law seeks to protect the right to vote, not the ability to be guaranteed election." *Ibid.*

the Senate floor debate agreed, is whether a challenged electoral practice "result[s] in the denial of *equal access* to any phase of the electoral process for minority group members" (Senate Report 30 (emphasis added)).<sup>39</sup>

3. The foregoing discussion makes clear that appellees err in claiming that district court's finding that the multimember district plan dilutes black votes is subject to Fed. R. Civ. P. 52(a). Mot. to Dis. 21, 35-36. Like proximate cause in the law of torts, the term "results" requires an evaluation of the facts in light of the pur-

<sup>39</sup> The legislative background to amended Section 2 also makes this point clear in another way. Under amended Section 5 of the Act, jurisdictions with a history of discrimination touching upon voting may not obtain approval to enforce changes in their election laws that have the effect of causing a retrogression in the position of minorities with respect to their exercise of the franchise. *City of Lockhart v. United States*, 460 U.S. 125, 133-136 (1983); *Beer v. United States*, 425 U.S. 130, 137 (1976). The legislative history of amended Section 2, however, conclusively shows that the Section 5 retrogression standard was not incorporated into Section 2. Senate Report 68; *id.* at 104 n.24 ¶ 8 (Supplemental Views of Sen. Hatch); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner with Rep. Edwards concurring); *id.* at S7095 (daily ed. June 18, 1982) (Sen. Kennedy); *id.* at S6930 (daily ed. June 17, 1982) (Sen. DeConcini); 2 *Senate Hearings* 80 (Statement of Sen. Dole); 1 *Senate Hearings* 414 (testimony of Laughlin McDonald, Southern Regional Dir., ACLU); *id.* at 449 (testimony of Mayor Henry L. Marsh); *id.* at 801 (testimony of Armand Derfner); *id.* at 891-892 (colloquy between Rep. Sensenbrenner and Sen. Grassley); *id.* at 1254 (colloquy between Subcomm. Counsel Markman and Julius L. Chambers, Pres., NAACP Legal Defense Fund); *id.* at 1575-1576 (Prepared Statement of Nathan Z. Dershowitz, Amer. Jewish Congress). The Senate report expressly states that "[p]laintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment \* \* \* involved a retrogressive effect on the political strength of a minority group" (Senate Report 68 n.224). In other words, while a retrogressive effect may be relevant evidence, access, not effect, is the touchstone of a Section 2 inquiry.

While some courts have said that retrogression alone may violate amended Section 2, those courts have failed to consider the above legislative history. See *Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984), cert. denied, No. 84-627 (June 3, 1985); *Buskey v. Oliver*, 565 F. Supp. 1473, 1482 (M.D. Ala. 1983).



poses of the policy being served. Cf. *Metropolitan Edison Co. v. PANE*, 460 U.S. 766, 774 (1983) (construing terms “‘environmental effect’” and “‘environmental impact’” in light of “the congressional concerns that led to the enactment of NEPA”). The question under amended Section 2—whether a particular electoral practice “results” in the denial of “equal access” to the political process—thus calls for more than a factual conclusion not only because Congress eschewed reliance upon a “mechanical ‘point counting’ device” to resolve Section 2 claims (Senate Report 29 n.118; see 128 Cong. Rec. S6648 (daily ed. June 17, 1982) (Sen. Grassley)); but also because the undertaking requires a careful analysis of the challenged electoral process, as informed by its actual operation, including the nonquantifiable, but undeniable, fact that a numerical minority may exercise substantial, and sometimes decisive, influence upon the process. See *Whitcomb*, 403 U.S. at 149-155.<sup>40</sup> The Court has recognized in a variety of other situations that a conclusion based largely upon the application of a rule of law to a particular set of facts is a legal, not a factual conclusion.<sup>41</sup> In addition, for plaintiffs as well as de-

<sup>40</sup> See, e.g., *Whitcomb*, 403 U.S. at 150 (footnote omitted) (where “ghetto votes were critical to Democratic Party success \* \* \* it seems unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates”); *Dove v. Moore*, 533 F.2d at 1153, 1155 n.4 (noting that local voters “have a strong affinity for incumbents” and that each candidate’s 40% black constituency “cannot be ignored with impunity”). See also *Seamon v. Upham*, No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), aff’d sub nom. *Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984); page 22 note 46, *infra*.

<sup>41</sup> Compare, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, No. 83-1632 (May 20, 1985), slip op. 20, and *Strickland v. Washington*, No. 82-1554 (May 14, 1984), slip op. 27-28, with *Wainwright v. Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 15-17, and *Patton v. Yount*, No. 83-95 (June 26, 1984), slip op. 11-13 & n.12. See generally *Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984). In this respect, the inquiry under amended Section 2 is similar to the type of analysis that appellate courts follow in determining whether a particular adjudicative procedure is consistent with due process (e.g., *Walters*

fendants “the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact” (*Bose Corp. v. Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984), slip op. 15 n.17; see *id.* at 15-25). Were the ultimate issue under amended Section 2 simply a question of fact, plaintiffs would be disabled from effectively challenging decisions where, on an essentially standardless basis, the court determined that the “totality of the circumstances” did *not* support their case. Accordingly, because it is clear that an appellate court must independently resolve mixed questions of fact and law (*Bose Corp.*, slip op. 15), this Court is not bound by Rule 52(a) in determining whether the multi-member districts in the 1982 reapportionment plan violates Section 2.<sup>42</sup>

#### B. The District Court Misapplied The Factors Appropriate To An Analysis Of Appellees’ Claim Of Unlawful Vote Dilution

In voiding the use of multi-member districts in the 1982 reapportionment plan, the district court made two fundamental errors in construing and applying amended Section 2, either of which is sufficient to require reversal. First, the court found a violation of the statute in the

*v. National Ass’n of Radiation Survivors*, No. 84-571 (June 28, 1985)) and whether a state law violates the First Amendment Establishment Clause (e.g., *Grand Rapids School Dist. v. Ball*, No. 83-990 (July 1, 1985)).

<sup>42</sup> The decisions of this Court and the lower courts both before *City of Mobile* and after passage of amended Section 2 also make this point clear. These decisions have engaged in a far more searching review of a district court’s analysis than application of Rule 52(a), which appellees advocate here, would permit. See, e.g., *Whitcomb v. Chavis*, 403 U.S. at 144-155; *Jones v. City of Lubbock*, 727 F.2d 364, 383-386 (5th Cir. 1984); *Hendrix*, 559 F.2d at 1268-1271; *David v. Garrison*, 553 F.2d 923, 929-931 (5th Cir. 1977); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109, 1112-1113 (5th Cir. 1975). The court in *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984), thus erred in stating that an ultimate Section 2 finding is a question of fact. The court was mistaken as to the central question to be answered under the statute. Pages 14-17, *supra*.

absence of evidence that the "results" of the multi-member legislative districts challenged here denied minority voters an equal opportunity to participate in the electoral process. Second, the court adopted an erroneous definition of racially polarized voting, one that misconceives the proper force of that criterion as an element of a successful Section 2 claim.

1. a. Each of the districts is a multimember district. However, it is firmly settled that multimember districts are not inherently unlawful. Senate Report 33; *White*, 412 U.S. at 765; *Whitcomb v. Chavis*, *supra*; see also 2 Senate Hearings 81 (statement of Sen. Dole). While it is true that in each of the districts at issue here it would be possible to create one or more single-member districts with effective black voting majorities (see pages 3-6, *supra*), this point cannot be dispositive. Minority voters have no right to the creation of safe electoral districts merely because they could feasibly be drawn. *Whitcomb v. Chavis* established that principle prior to the 1982 amendment to Section 2, and the Court's recent summary affirmances in *Brooks v. Allain*, No. 83-1865 (Nov. 13, 1984), and *Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984), have reaffirmed that principle under amended Section 2.<sup>43</sup>

<sup>43</sup> In *Seamon*, the district court rejected a Section 2 claim that minority voters were entitled to a "'safe' district in which the minority population approaches 65% of the overall population" (No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), slip op. 11-12). Under the challenged plan, minority voters, while not guaranteed the ability to elect one a representative of their choice, were found to "exert a significant impact" and to "play pivotal roles in key elections" in two high minority impact districts (*id.* at 15). Similarly, in *Brooks*, the plaintiffs urged the three-judge district court to create a congressional district with a 64% black population minimum on the ground that, because of low voter registration and turnout among blacks, they would be unable to elect candidates of their choice with a lesser percentage. In rejecting the super-majority plans proposed by the plaintiffs, the court noted that "[a]mended § 2 \* \* \* does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process" (No. GC82-80-WK-O (N.D. Miss. Apr. 16, 1984), slip op 15). This Court's summary affirmances in *Seamon* and *Brooks* establish that minorities do not

Nor can it be presumed without more that "safe" seats for minority *officeholders* would necessarily be in the interests of minority voters. See *United States v. Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978). Accordingly, if the "gravamen" of appellees' claim is simply that North Carolina chose to use multimember districts where "there are sufficient concentrations of black voters to form majority black single-member districts" (J.S. App. 4a), their claim necessarily falls short of establishing a violation.<sup>44</sup>

b. Moreover, in three of the challenged districts, black candidates supported by the black community have been elected under the challenged plan in numbers as great as *or greater than* would be expected under a single-member plan, and black voters have wielded influence over other

have a right under Section 2 to the creation of "safe" minority-controlled districts, even where other objective factors contribute to the finding of a violation of Section 2 under the "totality of the circumstances." Moreover, as we explained in our brief (at 8-19) in *City Council v. Ketchum*, cert. denied, No. 84-627 (June 3, 1985) (a copy of which has been served upon the parties), creation of super-majority districts as a matter of law is inappropriate to remedy a Section 2 violation.

<sup>44</sup> The district court correctly recognized that a lawful state policy regarding a particular electoral practice is entitled to weight (*Whitcomb*, 403 U.S. at 149; see *Upham v. Seamon*, 456 U.S. 37 (1982)), but erred by disregarding the North Carolina policy against splitting legislative districts (J.S. App. 49a-50a). The court acknowledged that "the state adduced fairly persuasive evidence that the 'whole-county' policy was well-established historically, had legitimate functional purposes, and was in its origins completely without racial foundation" (*id.* at 50a). But the court held that "that all became irrelevant as matters developed in this particular legislative plan" (*ibid.*) because the legislature chose to split counties "only when necessary to meet population deviation requirements or to obtain § 5 preclearance" (*ibid.* (emphasis added)). That reasoning is plainly in error. The fact that the state adhered to its policy except where necessary to ensure that each voter—black and white—had his vote counted equally and to ensure that the reapportionment plan did not cause a retrogression in the political strength of black voters (see page 17 note 39, *supra*) surely counts in the state's favor.



seats as well. Even since 1973, black voters in House District 23, who make up 36.3% of the population and 28.6% of the registered voters, have elected a black member of the three-person delegation. Page 4, *supra*.<sup>45</sup> In House District 21, the 21.8% black minority, constituting 15.1% of the registered voters, elected a black representative to its six-member delegation in 1980 under a substantially-identical predecessor to the challenged plan (J.S. App. 19a) and reelected him in 1982 under the challenged plan. Pages 3-4, *supra*. The district court's error is even clearer in House District 39. In that district, where 25.1% of the population is black and 20.8% of the registered voters are black, a black candidate was elected to the five-member delegation in 1974 and reelected in 1976. In 1982, under the challenged plan, two black representatives, or 40% of the delegation, were elected. Page 5, *supra*. By contrast, under the alternative plan favored by appellees, in each of these districts black voters would be relegated to one single-member district with a large black majority. The ability of black voters to contest the remaining seats would be lessened—indeed, in House District 39 minority voters could have a reduced number of delegates—and (more importantly) their electoral influence on the other representatives would be reduced.<sup>46</sup> Accordingly, judged simply on the basis of recent electoral “results,” the multimember

<sup>45</sup> The population percentages in the five counties may overestimate the actual voting strength of minorities, because the percentage voting age population in these districts may be less than the population percentage. See page 3 note 5, *supra*.

<sup>46</sup> As Prof. Archibald Cox informed the Senate Subcommittee, “[v]oters in a minority group may have exactly the same opportunities for participation as other voters, even though no members of the group are elected to office. The minority may not vote as a bloc. The minority may vote as a bloc but make its influence felt in the selection of non-minority candidates for election, in framing their programs and policies, and in support of one or more candidates against their opponents.” 1 *Senate Hearings* 1428 (Prepared Statement). Indeed, in the 1982 primaries in House Districts 23 and 36, whites did not field a candidate for each of the

plans in these districts have apparently enhanced—not diluted—minority voting strength.

In the remaining districts—House District 36 and Senate District 22—black candidates have been less successful. Even there, however, the 26.5% black minority in the House district, constituting 18% of the registered voters, elected a black member to the eight-member delegation in 1982, and a second black candidate (who lost in the general election) received 39% of the white vote in the primary. Pages 4-5, *supra*. In Senate District 22, although the 24.3% black minority, constituting 16.8% of the registered voters, has not been able to elect a black Senator in the 1980s, a black candidate prevailed throughout the period 1975-1980. Pages 5-6, *supra*.<sup>47</sup>

open positions. Pages 4-5 notes 7-8, *supra*. That fact reinforces the conclusion that blacks have not been denied equal access to the electoral process in these districts by virtue of the multi-member plan, because the make up of the candidate slate is itself a reflection of and a response to the voting strength of the various constituencies in a district.

<sup>47</sup> Appellees seek to minimize the significance of this electoral success on the ground (Mot. to Dis. 26-27) that the 1982 election year was “obviously aberrational”—attributing this conclusion to the district court. However, the district court’s words have been taken out of context. The court’s finding (J.S. App. 37a (footnote omitted)) was as follows:

There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.

In a footnote, the court observed that both parties had offered evidence to establish either that the 1982 elections presaged a “breakthrough” or that they were “aberrational.” The court stated that its “finding” in text (quoted above) “reflects our weighing of these conflicting inferences” (*id.* at 37a n.27). It is thus inaccurate for appellees to assert that the district court adopted their view that the 1982 elections should be disregarded as “aberrational.” In fact, the most that can be said is that the court rejected the opposing view—that the 1982 election results should be deemed evidence that black candidates would achieve even greater success in the “imminent” future.



This experience cannot be reconciled with the district court's holding that the challenged plan results in vote dilution.<sup>48</sup> Indeed, the district court never articulated a standard under which "results" such as these could support a conclusion that the multi-member electoral system in these districts—which is the procedure under challenge—is "not equally open to participation" by black voters. The court only stated—without reference to actual results in any of the challenged districts—that "the success that has been achieved by black candidates to date" is "too minimal in total number and too recent" to support a finding that a black candidate's race is no longer "a significant adverse factor" (J.S. App. 37a-38a).<sup>49</sup> How-

<sup>48</sup> It is inappropriate to conclude, as some courts have done, that the state must prove that the existence of past discrimination has not reduced the current potential electoral success of black candidates. *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984). That approach misconstrues the governing legal standard, improperly shifts the burden of proof, and requires proven and continued minority electoral success to avoid Section 2 liability. Neither Congress nor Senator Dole had any such requirement in mind. Pages 12-17, *supra*, and pages 27-28, *infra*.

<sup>49</sup> Appellees claim (Mot. to Dis. 27, 41; Supp. Br. 10 & n.9) that the district court's disparagement of black electoral success in the challenged districts is supported by language in the Senate majority report, a document which, we have argued, cannot be taken as determinative on all counts. In any event, the report simply notes (Senate Report 29 n.115) that the election of a "few" minority candidates should not be deemed conclusive because it would enable election officials to evade amended Section 2 by engineering the election of "a 'safe' minority candidate." The case cited by the report to illustrate this caveat, *Zimmer*, arose in a context "where the multi-member system was devised, despite historic policy and a state statute forbidding it, in reaction to a dramatic voter registration drive directed at blacks, who, although comprising 58 per cent of the parish's population, had not been permitted to vote until 1962" (*Black Voters*, 565 F.2d at 4). Given these circumstances, an "abrupt change in policy—which coincided with increased black voter registration" (*Wallace*, 515 F.2d at 631), *Zimmer* declined to treat recent black electoral success as dispositive.

Appellees have failed to prove that black electoral success in these districts is attributable to 11th hour efforts by the General As-

ever, the election of representatives in numbers as great as or greater than the approximate black proportion of the population, as in House Districts 21, 23, and 39, is surely not "minimal." And in House District 36 and Senate District 22, while the results admittedly fall short of a standard of "proportional representation"—which Congress rejected as the governing legal criterion—minority candidates either are or have been successful and plainly are competitive.<sup>50</sup> In fact, the district court itself concluded that "[t]hirty-five years after the first successful candidacies for public office by black citizens in this century, it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina" (J.S. App. 37a).

The district court also erred by discounting the proven minority electoral success on the ground that it was "too recent in relation to the long history of complete denial of any elective opportunities" to support the conclusion

sembly to engineer the election of "safe" minority candidates to thwart a Section 2 claim. Indeed, the district court made no mention of any evidence that would tend to support such a claim. Moreover, the district court noted that "in recent years there has been a measurable increase in the ability and willingness of black citizens to participate in the state's political processes and in its government at state and local levels" (J.S. App. 47a). The district court discounted this increased participation because of its finding of racial polarization (*ibid.*), but that finding is flawed in several respects (see pages 28-33, *infra*).

<sup>50</sup> The court's reasoning is also flawed in another respect. Although the district court made factual findings on a district-by-district basis, it drew its ultimate legal inferences regarding racial bloc voting and the effect on minority electoral opportunities on the basis of "[t]he overall results achieved to date at all levels of elective office" (J.S. App. 37a). It is only on such a basis that the court could have held that black electoral success is "minimal" in a district such as House District 39, where the 25.1% black minority has, with substantial white support, elected 40% of the at-large representatives. To invalidate a specific district on the basis of generalized statewide results at "all levels of elective office" is a clear legal error. See *White v. Regester*, 412 U.S. at 769 (requiring an "intensely local appraisal" of the electoral scheme).

that "a black candidate's race is no longer a significant adverse factor" (J.S. App. 37a-38a). That ruling is overbroad. To the extent that the court held that past discrimination cannot be overcome by providing minorities with contemporary access to the process, that ruling is in error. The lower court decisions prior to *City of Mobile* repeatedly emphasized that the key question is not whether there was past discrimination but whether that discrimination prevents minorities from *currently* participating in the political process. See, e.g., *Hendrix*, 559 F.2d at 1270; *David*, 553 F.2d at 930; *Bradas*, 508 F.2d at 1112; *Zimmer*, 485 F.2d at 1306; accord, *McCarty v. Henderson*, 749 F.2d 1134, 1137 (5th Cir. 1984).<sup>51</sup> Historical discrimination that has resulted in a current lower minority registration rate, for instance, as the district court found to be the case here (J.S. App. 22a-26a & n.22), is an entirely appropriate consideration under amended Section 2.<sup>52</sup> But past discrimination that does not deny minorities current access to the political process cannot support a violation of the Act.<sup>53</sup> And to the extent that the district court held that

<sup>51</sup> As Senator Heflin stated, "[t]he Dole compromise has a now application but allows for a consideration of yesterday factors as well as present day good faith efforts to remedy past mistakes if the yesterday factors touch on the new result." 128 Cong. Rec. S6964 (daily ed. June 17, 1982).

<sup>52</sup> This history may have had an effect in House District 36 and Senate District 22, given the electoral results in those districts; but, viewed in combination with other factors, it appears not to have shut blacks out of the electoral process there (see pages 32-34, *infra*). Given the fact that minorities have been elected to office in House Districts 21, 23, and 39 in numbers at least as great as would be expected under a single-member system, the historical discrimination found by the district court does not appear to have affected the electoral opportunities that black voters enjoy in those districts.

<sup>53</sup> The district court thus plainly erred by relying (J.S. App. 29a) upon inoperative numbered seat and anti-single shot voting requirements of state law. As the court itself noted (*id.* at 23a-24a), those requirements were invalidated more than a decade ago (*Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972)), and there is no basis in amended Section 2 (or logic) for concluding that these

past discrimination persists in the form of racial bloc voting, the court relied upon an erroneous definition of that concept, as we will later explain.

Congress could not have expressed more clearly its intention not to invalidate multimember districting plans where minorities have had an equal opportunity to participate in the electoral process, even if minority candidates did not win a proportionate share of the seats.<sup>54</sup> Congress adopted Senator Dole's compromise precisely to ensure that Section 2 would guarantee minority voters access to the electoral process—not ensure victories for minority candidates—as the Senate floor debate plainly demonstrates. Pages 15-17, *supra*. See also *Rogers*, 458 U.S. at 616; *Whitcomb*, 403 U.S. at 158-159 (multimember districts challenged for "their winner-take-all aspects").<sup>55</sup> The pre-*City of Mobile* decisions of this and other courts bear out that multimember districts are not unlawful where, as here, minority candidates are not effectively shut out of the electoral process. The closest

now-repealed legal measures could have any current effect on the multimember system. See pages 12-17, *supra* (discussing Sen. Dole's compromise).

<sup>54</sup> The district court plainly misconstrued the significance of Congress' rejection of the proportional representation standard. The court dismissed the "proportional representation" disclaimer in Section 2(b), 42 U.S.C. 1973(b), as meaning no more than that the fact that blacks have not been elected in numbers proportional to their percentage of the population "does not *alone* establish that vote dilution has resulted" (J.S. App. 15a & n.13 (emphasis added)). As discussed above (pages 9-17), the disclaimer was expressly drafted to avoid any such narrow interpretation. In effect, the district court has interpreted the Act as imposing a "proportional representation plus" standard, rather than an "equal opportunity" standard, as Congress intended.

<sup>55</sup> As Armand Derfner explained to the Senate Subcommittee (1 *Senate Hearings* 803): "the at-large elections that I \* \* \* have been focusing on are those in which the result of those at-large elections is basically to shut out the minority voters. It is not a question of whether they will get more or less or whether the majority voters will get more or less. It is a question of some versus nothing."



analogy to this case is *Dove v. Moore, supra*, in which the court of appeals upheld the validity of an at-large system under which the 40% black minority elected one member to an eight-member city council. Indeed, in many cases prior to *City of Mobile* involving at-large voting systems where the aggregate of factors was unquestionably less favorable to minority voters than in this case—most particularly, where no black citizen had ever been elected under the system—challenges to the voting plans were nonetheless held to be insufficient. See, e.g., *Black Voters v. McDonough, supra*; *Hendrix v. Joseph, supra*; *David v. Garrison, supra*; *McGill v. Gadsden County Comm'n*, 535 F.2d 277 (5th Cir. 1976). And it is significant that the Senate majority and other supporters of amended Section 2 pointed to these cases—including *Dove v. Moore*—as indications of the way in which the new provision would operate. See, e.g., Senate Report 33; 1 *Senate Hearings* 795-796, 797 (testimony of Armand Derfner); *id.* at 1701-1702 (colloquy between Sen. Mathias and Assistant Attorney General Reynolds regarding *Dove*). Accordingly, given the proven electoral success that black candidates have had under the multimember system, the district court erred by concluding that use of that system “results” in a denial of “equal access” to the electoral process for minorities.

2. The district court correctly held (J.S. App. 15a) that proof of racial bloc voting is the “linchpin” of a successful vote dilution claim. See Senate Report 33.<sup>56</sup>

<sup>56</sup> As the Court explained in *Whitcomb* (403 U.S. at 153), where “the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes \* \* \* [t]he voting power of ghetto residents may have been ‘cancelled out’ \* \* \* but this seems a mere euphemism for political defeat at the polls.” See also *United Jewish Orgs. v. Carey*, 430 U.S. 144, 166 n.24 (1977) (plurality opinion) (“if voting does not follow racial lines, the white [or black] voter has little reason to complain that the percentage of nonwhites [or whites] in his district has been increased”).

It is erroneous, however, to conclude that proof of racial bloc voting atop numerical underrepresentation together are sufficient

However, the district court adopted a definition of racial bloc voting under which racial polarization is “substantively significant” or “severe” whenever “the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election” (J.S. App. 39a-40a (footnote omitted)). This means that even a minor degree of racial bloc voting would be sufficient to make out a violation, regardless of whether it actually results in black electoral defeats. For instance, in a two-person election where there is a small white voting majority, if the white candidate receives 51% of the vote in the white community and 49% of the vote in the black community, and the black candidate receives the reverse, the district court would hold that the community is *severely* racially polarized. That definition is unacceptable because “‘there will almost always be a raw correlation with race in any failing candidacy of a minority whose racial or ethnic group is [a] small percentage of the total voting population’” (*Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1482 n.15 (11th Cir. 1984) (quoting *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., specially concurring)); see *Terrazas v. Clements*, 581 F.

to establish a violation of amended Section 2, as some courts have said. See *McMillan*, 748 F.2d at 1043; *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1566 (11th Cir. 1984). Supporters of the Act stated that proof of more than numerical underrepresentation and racial bloc voting is essential to establish a Section 2 violation. See 1 *Senate Hearings* 819-820 (Prepared Statement of Armand Derfner) (emphasis in original) (“amended section 2, like *White v. Regester*, applies only in that small category of places where there is no functioning system of politics for minority voters, where there is already severe racial division, and where it is simply impossible for minority voters to have any significant opportunity under the election system as it is”); accord, e.g., *id.* at 287 (Memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 564 (testimony of Joaquin G. Avila, Assoc. Gen. Counsel, MALDEF); *id.* at 1184 (testimony of Frank Parker, Dir., Voting Rights Project, Lawyers’ Comm. for Civil Rights Under Law).



Supp. 1329, 1351-1352 (N.D. Tex. 1984) (three-judge court) (test is whether "such bloc voting as may exist" operates so as to "persistently defeat [minority] candidates"); accord, *Seamon v. Upham*, slip op. 10 n.4.<sup>57</sup> Under the district court's definition, virtually any electoral district in the country might be deemed to suffer "substantively significant" racial bloc voting. Congress believed that the contrary was true, however. See Senate Report 33 (in "most communities" minority candidates "receive substantial support from white voters").<sup>58</sup>

<sup>57</sup> In most vote dilution cases, a plaintiff can establish a prima facie case of racial bloc voting by using a statistical analysis of voting patterns that compares the race of a candidate with the race of the voters. A defendant can then introduce its own study, which takes other factors into account, to rebut a plaintiff's prima facie case. For a discussion, in a different context, of the type of statistical studies that can be used, see *McCleskey v. Zant*, 580 F. Supp. 338, 352-379 (N.D. Ga. 1984), aff'd, 753 F.2d 877 (11th Cir. 1985) (en banc). Resort to such analyses has been approved. As Judges Higginbotham and Wisdom have cogently observed, "race or national origin may mask a host of other explanatory variables" including "explanatory factors \* \* \* as intuitively obvious as campaign expenditures, party identification, income, media use measured by cost, religion, name, identification, or distance that a candidate lived from a particular precinct" (*Jones*, 730 F.2d at 235 (Higginbotham, J., specially concurring); *Lee County*, 748 F.2d at 1482 (Wisdom, J.)).

<sup>58</sup> See 1 *Senate Hearings* 821 (emphasis added) (Prepared Statement of Armand Derfner) ("Section 2, of course, will apply only in those places where there is already an extraordinary amount of [racial] division"). Other witnesses also described racial bloc voting in less absolute terms than the district court. See *id.* at 306 (Prepared Statement of Vilma S. Martinez, President, MALDEF) (emphasis added) ("It is a situation where, when candidates of different races are running for the same office, the voters will by and large vote for the candidate of their own race") (citation omitted); *id.* at 543 (testimony of Prof. Susan A. MacManus (emphasis added) ("racial polarization \* \* \* occurs when citizens of one racial group uniformly vote for one candidate and citizens of another racial group uniformly vote for another. \* \* \* [T]he basic purpose of the test [for calculating racial polarization] is to determine whether race is the primary and exclusive determinant of individual voting decisions across time in any given community").

If white voters are willing to cross racial lines in sufficient numbers that "minority candidates [do] not lose elections solely because of their race" (*Rogers*, 458 U.S. at 623), then it is largely irrelevant whether the black candidate would have won even if the election "had been held among only the white voters" (J.S. App. 40a). In that case, racially polarized voting, to the extent that it exists, is not "the overriding criterion in voting" (*Dove*, 539 F.2d at 1156). It was firmly settled prior to 1982 that no person had the right to be represented by members of any particular group to which he belongs or to participate in an electoral process that maximizes his chances of success, either as a voter or a candidate. Rather, the principle repeatedly endorsed was the right to participate in an electoral process—to vote, first and foremost, but also to join a political party, to participate in its affairs, to become a candidate (*Whitcomb*, 403 U.S. at 149-150)—in which there is no "built-in bias" against the opportunity to participate (*id.* at 153).<sup>59</sup> Amended Section 2 reaffirmed these principles. See Senate Report 23-24, 30. It thus follows that where "blacks and whites alike have rejected race as the overriding criterion in voting" (*Dove*, 539 F.2d at 1155-1156), then, since no such "built-in bias" exists, "minority candidates [will] not lose elections solely because of their race" (*Rogers*, 458 U.S. at 628), and the political process is, by definition, "equally open to participation" by minorities (*White*, 412 U.S. at 766; see *Whitcomb*, 403 U.S. at 153). In other words, the relevant inquiry is not simply into the existence of bloc voting by race; the court must assess the effect of racial polarization on the opportunity for blacks to participate in the political process. Only where the impact of racial bloc voting in combination with the

<sup>59</sup> See *City of Mobile*, 446 U.S. at 75-80 (plurality opinion); *id.* at 86 (Stevens, J., concurring in the judgment); *id.* at 111 n.7 (Marshall, J., dissenting); *United Jewish Orgs.*, 430 U.S. at 165-168 (plurality opinion); *Beer*, 425 U.S. at 136 n.8; *Whitcomb*, 403 U.S. at 149-160; *Taylor v. McKeithen*, 499 F.2d 893, 905 (5th Cir. 1974) (Wisdom, J.); *Turner v. McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973) (Brown, C.J.).

challenged procedure—here, multi-member districts—deprives black voters of equal access to the electoral process is Section 2 offended.

3. Given the electoral success that black candidates have attained with substantial white support in House Districts 21, 23, and 39—success equal to or greater than could be expected under single-member districts—it is difficult to imagine any basis for invalidating these districts under Section 2.<sup>60</sup> And while black candidates have been less successful in House District 36 and Senate District 22, the district court's findings as to those districts warrant no different result. They show that black candidates have received substantial white voting support.<sup>61</sup> In one

<sup>60</sup> In House Districts 21, 23, and 39, where black candidates have been elected in numbers at least as great as would be expected under a single-member plan, black candidates have received substantial white support. In House District 21, the black candidate in the 1978 primary (Blue) received 21% of the white vote, but he later increased his share of the white vote in 1980 to 31% in the primary and 44% in the general election and was elected; in 1982 he again increased his share to, respectively, 39% and 45% of the white vote in the primary and general election and was re-elected. J.S. App. 44a. In House District 23, a black Republican ran in the 1978 general election and received more white votes (17%) than black votes (5%). The black candidate was unopposed in the 1978 general election, and in the 1980 primary and general election. Nonetheless, he received 16% and 37% of the white vote in the 1978 primary and general election, 49% of the white vote in the 1980 general election, and 37% and 43% of the vote in the 1982 primary and general election, respectively. J.S. App. 43a-44a. In House District 39, the two black representatives elected in 1982 received 25% and 36% of the white vote in the primary, and 42% and 46% of the white vote in the general election. One of those representatives had previously received 40% and 32% of the white vote in the 1980 primary and general election, respectively. In 1978, a black republican candidate received more white votes (33%) than black votes (25%) in the general election. J.S. App. 42a-43a.

<sup>61</sup> In House District 36, the black representative elected in 1982 received 50% of the white vote in the primary and 42% in the general election. Another, unsuccessful black candidate in that race received 39% and 29% of the white vote in the primary and general election, respectively. This was an increase from 1980,

case, a black candidate ran unopposed for a delegate seat, which is significant because the make-up of the candidate slate is indicative of the voting strength of a district's constituencies. Page 22 note 46, *supra*. It is also significant, as the court's opinion reveals, that there are no present barriers to minority registration, party affiliation, or candidacy; no anti-single shot voting or equivalent requirement has been employed; candidate slating has not been dominated by white voters; and there is no majority vote requirement in general elections. Some or all of these factors were usually present in pre-*City of Mobile* cases in which multi-member districts were invalidated or were expressed during Congress' consideration of the 1982 amendments as a justification for their enactment. See, e.g., *White*, 412 U.S. at 623-624; *Wallace v. House*, 515 F.2d 619, 623-624 (5th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947 (1976); *Zimmer*, 485 F.2d at 1305-1306; cf. *Whitcomb v. Chavis*, *supra*; *Black Voters*, 565 F.2d at 6; *Bradas*, 508 F.2d at 1112; Senate Report 10 n.22; House Report 31 n.105. The absence of such barriers to participation in the electoral process, coupled with the findings made by the court regarding the success that black candidates have had and the white voting support that these candidates have received in House District 36 and Senate District 22, supports the conclusion that the multi-member system has

when a different black candidate received 22% and 28% of the white vote in the primary and general election, respectively. In Senate District 22, the black member of the four-person delegation from 1975-1980 received 47% of the white votes in the 1978 primary and 41% in the general election. A second black candidate (Polk) ran in 1982 and garnered 32% of the white vote in the primary and 33% in the general election. J.S. App. 42a. Moreover, while blacks form only 31% of the population of the city of Charlotte, a black Democratic candidate was elected mayor with 38% of the white vote against a white Republican. J.S. App. 35a. This figure is significant because it shows that in a head-to-head contest more than one-third of the white voters were willing to vote for a black candidate in Charlotte. Blacks also held 28.6% of the district and 16.7% of the at-large city council seats from 1977-1981. J.S. App. 34a.

not deprived blacks of the opportunity to participate in the electoral process in these two districts.<sup>62</sup>

### CONCLUSION

The judgment of the district court should be reversed.  
Respectfully submitted.

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JULY 1985

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<sup>62</sup> Should the Court nonetheless conclude that there is an insufficient basis in the record for finding no violation of amended Section 2 with respect to these two districts, then, given the district court's reliance upon an incorrect legal standard, the appropriate disposition would be to remand the case to the district court for further proceedings under the correct legal standard. See *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982).



MOTION FILED  
AUG 29 1985

No. 83-1968

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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LACY H. THORNBURG, *et al.*,  
*Appellants*

v.

RALPH GINGLES, *et al.*,  
*Appellees*

---

On Appeal from the United States District Court  
for the Eastern District of North Carolina

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
AND  
BRIEF OF LEGAL SERVICES OF NORTH CAROLINA**

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IN THE  
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On Appeal from the United States District Court  
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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
OF LEGAL SERVICES OF NORTH CAROLINA  
IN SUPPORT OF RESPONDENT**

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Legal Services of North Carolina and several of its constituent programs move this Court, pursuant to Rules 36 and 42 of the Rules of the Court, for leave to file the attached brief *amicus curiae*.

Movant wishes to present views in support of the position of the respondent (as stated in its brief to this Court in support of the motion to dismiss or affirm the appeal). This motion is timely pursuant to Rule 36.3, since it is made prior to the filing of respondent's brief on August 30, 1985.

Movant is especially concerned about statements contained in the brief for *Amicus Curiae*, the United States,

sponsored by the Solicitor General. Its brief contained the following statement: "... there are no present barriers to minority registration or candidacy." Brief for *Amicus Curiae*, the United States at 18 n. 17.

Movant, as counsel in two cases in the Eastern District of North Carolina, filed pursuant to provisions of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, is convinced that the above quoted assertions presented by the United States are factually and legally incorrect. Movant is further convinced that arguments in opposition to these specific contentions by United States have not been presented in full by any party or *Amici* herein. Without unnecessary duplication of matter already before the Court, movant presents an analysis of these key voting participation factors so relevant to this case in the accompanying brief *amicus curiae*.

For this reason, movant Legal Services of North Carolina respectfully moves this Court pursuant to Rule 36.3 for leave to file the accompanying brief *amicus curiae*.

Movant, Legal Services of North Carolina, has received written consent to file this brief from counsel for respondent herein by letter dated July 12, 1985. Consent of the appellants, as represented by the Attorney General of North Carolina has not been obtained.

Respectfully submitted,

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August, 1985

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**BRIEF OF LEGAL SERVICES OF NORTH CAROLINA**  
\_\_\_\_\_

**INTEREST OF AMICUS CURIAE**

Amicus, Legal Services of North Carolina (LSNC), including two of its affiliate programs, is deeply and intimately concerned about the outcome of this case. Two LSNC field programs have represented, or are currently representing, plaintiffs in actions filed against municipal governing bodies, pursuant to the Voting Rights Act. *Canady v. Lumberton City Board of Education*, No. 80-215-Civ-3 (E.D.N.C. filed Dec. 22, 1980); *Green v. City of Rocky Mount*, No. 83-81-Civ-8 (E.D.N.C. filed September 25, 1983).

LSNC is essentially a statewide program responsible for civil representation of poor people in eighty three of North Carolina's 100 counties. LSNC includes twelve

geographically based local field programs with multi-county regions that encompass some of the districts which are the subject of this appeal. In addition to the eighty three county service area, LSNC includes three special client programs responsible for services to migrant and seasonal farm workers, State prison inmates and mentally handicapped persons. The Legal Services programs in North Carolina are funded by the national Legal Services Corporation established by Congress in 1974.

Overall, Legal Services programs in North Carolina receive over 35,000 requests for assistance from eligible, low income persons each year, and provide service to approximately 25,000 of these persons. There are 1.3 million persons in North Carolina who are governmentally defined as eligible for legal services. The basic eligibility criterion is that annual gross family income be less than 125% of the federal poverty line.

Racial minorities and Native Americans are disproportionately represented within the State's poverty population served by Legal Services programs. The 1980 Census indicates that 51% of the State's poor are white and 45% are black, though blacks compose only 20% of North Carolina's population. There are also 55,000 non-federally-funded recognized Indians in North Carolina. Thousands of these legal-services-eligible, low income persons reside in districts which are the subject of this appeal and whose voting rights are affected by this challenge to the decision below.

In the Eastern District of North Carolina alone, not including the case at bar, no less than five actions alleging Voting Rights infractions have been filed since January, 1980. These actions, filed pursuant to Section Two and/or Section Five of the Voting Rights Act, affect city councils, county commissioners and other elective offices. In their respective regions, these local officials make daily decisions which impact directly on the health, economic

and social well being of low income and minority individuals. Legal Services programs in North Carolina have traditionally represented clients in substantive law areas, such as housing, consumer and governmental benefit programs which are directly impacted by actions of elected local and State officials.

With the decision of the court below, minorities in many North Carolina municipalities and communities have benefitted significantly. With the increased opportunity to participate in the political process and to elect representatives of their choice afforded by the decision below, minority representation in the North Carolina General Assembly has increased by over 400% since 1982, rising from a mere three to sixteen such elected officials. With this new representation, the General Assembly has become more responsive to the needs of minorities, especially low income minorities and other low income people, thereby enacting measures designed to address their needs.

An adverse decision in this case by the Court now would not only slow the progress achieved, but would make for a swift return to the recent past of racial contempt when government bodies showed little or no sensitivity to issues affecting black and low income citizens. A principle interest of *Amicus* is the protection and preservation of court decisions in voting rights cases achieved by its affiliate programs. However, no one should misjudge the stunning effect in North Carolina of this Court's reversal of the decision below. LSNC's interest in this case is thus considerable and justified. Affirmation of the ruling below is critical to the continued easing of racial tensions and stability of voting rights in North Carolina, and is justified under Section Two of the Voting Rights Act.



## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amicus*, Legal Services of North Carolina, urges affirmance of the judgment of the United States District Court for the Eastern District of North Carolina substantially for reasons set forth in the respondent's brief in support of its motion to dismiss or affirm this appeal. Respondent's brief develops with preciseness and force one of the keys to an affirmance of the judgment below which *Amicus* explores more fully here: black citizens in the challenged districts, and in the State as a whole, continue to be denied equal access to the political process and equal opportunity to elect candidates of their choice.

Appellants have argued that the Court find no violation of Section Two of the Voting Rights Act where there has been some success, however rare, by black candidates running for elective offices in multi-member districts. Appellees and *Amicus*, however, strongly urge the Court to hold that the recent and uncharacteristic election of a nominal number of black candidates is but *one* factor to consider. The Court, as a matter of law, must consider the totality of circumstances, applying all the objective factors enunciated by Congress in determining whether there is a violation of Section Two.

*Amicus* argues (Point I) that the district court below was correct in applying the totality of circumstances standard to North Carolina's proposed legislative redistricting plan. Point I further argues that the three-judge district court properly identified all the required factors identified by the Act, pertinent Congressional history and relevant case law, and applied these factors to the facts of this case.

Point II argues that, given the totality of circumstances that currently exist in the State of North Carolina, as a whole, and in the challenged districts, the district court's findings of fact and conclusions of law were neither clearly erroneous, nor wholly incorrect. North Carolina's

long history of disfranchisement and vote dilution tactics continues even today. Without strong and effective enforcement of the Voting Rights Act, these devices and practices would continue, in violation of Section Two, to dilute and chill black voter participation. *Amicus* discusses many of these rules and practices in detail in its brief. Finally, as part of the totality of circumstances, *Amicus* contends that North Carolina's political landscape still evidences frequent instances of subtle and not so subtle racial appeals in political campaigns. This practice places an undue burden on minority candidates and hampers their chances of being elected.

*Amicus* agrees with respondent that neither the expressed Congressional intent associated with Section Two of the Act, nor relevant federal court cases, provide any sanctuary for appellants. The judgment below should be affirmed.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY IDENTIFIED THE TOTALITY OF CIRCUMSTANCES STANDARD IN ASSESSING THE STATE'S PROPOSED REDISTRICTING PLAN PURSUANT TO SECTION TWO OF THE VOTING RIGHTS ACT.

The opinion of the three-judge court below did expressly deal with the proper standard for review of a Section Two vote dilution claim. Well-instructed by the decisions of the various federal courts and the clearly articulated factors set forth in the legislative history of the Voting Rights Act, the District Court grounded its decision in "the totality of circumstances." In doing so, the district court left little doubt as to its view of the relevant factors which are to be considered in determining whether black voters, because of the use of the multi-member district election system in certain North Carolina districts, "have less opportunity than other members of the electorate to participate in the political process and



to elect representatives of their choice." 42 U.S.C. § 1973, as amended.

But even more to the point is the fact that the district court's opinion specifically reiterates the pertinent factors listed in the Congressional reports accompanying the Act's passage. J.S. at 13a-14a. This is in addition to the court's extensive treatment of *White v. Regester*, 412 U.S. 755 (1973), and its progeny. J.S. at 10a-16a. The analysis of the court below, with respect to a Section Two vote dilution claim, clearly extends to the North Carolina redistricting plan. This multi-member election system was not open to full minority participation, and under *Regester* would constitute a violation of Section Two.

On this detailed analysis and the fully developed factual findings of the district court, there is little need to explore whether the court understood the Congressional mandate and relevant judicial precedents. Unlike the position advanced by the appellants, there is no question but that the district court considered all relevant factors without attaching undue significance to a single factor in its analysis. According to case law and the legislative history referenced above, the district court thoroughly performed the required analysis.

## **II. UNDER SECTION TWO OF THE VOTING RIGHTS ACT, THE DISTRICT COURT'S DECISION IS A CORRECT APPLICATION OF THE TOTALITY OF CIRCUMSTANCES STANDARD TO THE NORTH CAROLINA GENERAL ASSEMBLY DISTRICTS.**

### **A. The district court's detailed findings of fact are correct and support its conclusion of impermissible vote dilution.**

North Carolina has long enjoyed a reputation as a mecca for progressive southern politics. Rather than take a critical look at the lack of equal participation in the State's political process by blacks, many observers have

merely compared North Carolina to states like Mississippi, Alabama or Georgia which have well-documented histories of overt racism. A closer examination of North Carolina, however, would have revealed a sophisticated, official system operating to effectively limit black voter participation.

A recent update of the 1948 landmark state-by-state study by V.O. Key, *Southern Politics*, found that upon comparing North Carolina's "level of participation and modernization of the political process . . . and the emergence of race as a significant political issue, what remains is a political plutocracy that lives with a progressive myth." See Finger, *Fly Specs On a Tablecloth?—A Profile of North Carolina*, in *The State of the State, A Legal Services Perspective on the State of North Carolina* (1979). As the court found, North Carolina has a past and present history of discrimination against black voters in registration and voting. J.S. at 51a-52a. In 1900, white democrats used an overtly racist "white supremacy" propaganda campaign, violent intimidation and corruption in voting to persuade voters to amend the State's constitution to provide for a poll tax and a literacy test, with a grandfather clause designed to limit the disfranchising effects of the literacy test to blacks. As a result, by 1950, black voter registration and elective office-holding virtually disappeared. J.S. at 22a-23a.

North Carolina legislators enacted numerous other laws designed to disfranchise black voters. An anti-single shot mechanism was enforced beginning in 1955 which applied to specified municipalities and counties. A 1967 numbered seat plan also prevented single shot voting in multi-member legislative districts. Both were used until declared unconstitutional in 1972. J.S. at 23a.

The majority vote requirement used in primaries, but not in general elections, is another barrier to equal opportunity of black political participation. N.C. Gen. Stat. § 163-11. Candidates are required to obtain an absolute

majority of votes (50%, plus one), rather than a simple plurality to win. The effect of the majority vote requirement is to make it less likely that a minority candidate will win an election. Running head-to-head against a white candidate, the minority candidate usually is unable to overcome the white voter support of his opponent.

After the removal of direct barriers to voter participation, the chilling effect of decades of electoral discrimination, disfranchisement and candidate diminution persists. This factor accounts for the relatively low levels of black voter registration in the State today. J.S. at 25a-26a.

In 1981, when this action was commenced, North Carolina ranged among the bottom of southern and border states in the number of registered black voters. J.S. at 24a. The disparity in black and white registration results from the past and present official impediments to voting which still discourage blacks from participating fully in the political process.

**B. This disfranchisement continues in North Carolina and currently occurs indirectly by operation of rules and practices.**

Striking parallels exist between prior movements for enfranchisement of blacks and recent developments in North Carolina. The history of black enfranchisement in the South has been chronicled at length elsewhere. See, e.g., McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 Tenn. L. Rev. 1 (1983).

Until recently, the Attorney General has had a dismal record of monitoring and enforcing federal voting laws in North Carolina. For example, from 1965 to 1968, no North Carolina county subject to the Section Five preclearance provision of the Voting Rights Act submitted any voting change for preclearance by the Department. *Id.* at 63. Thus, the Justice Department has allowed

the effects of past discrimination to continue to serve as barriers to full participation by blacks in the electorate in this State.

Because of its lax enforcement record in North Carolina, the Department of Justice totally misapprehends the current lack of equal opportunity for participation by black voters in the State's political processes and that group's ability to elect representatives of their choice. In a footnote to the Attorney General's *amicus* brief in this appeal, the Department makes a bold assertion. To support its contention that minority candidates elected in the challenged districts are both "successful" and "competitive," Brief for *Amicus Curiae*, the United States at 18, the Department states: "... there are no present barriers to minority registration or candidacy." Brief at 18 n.17. Nothing could be further from reality. The manipulation of election procedures today by local officials to perpetuate voter discrimination continues to taint North Carolina elections.

This naked assertion, unsupported by any documentation in the Brief, reflects the Department of Justice's ignorance, which no doubt results from depressed voting rights enforcement activities in North Carolina. Many of the voting practices and irregularities which *Amicus* discuss in detail below occur unchallenged in local precincts and counties across the State. Few local individuals or organizations have the resources and expertise to challenge any of these practices. The Voting Rights Act, however, was designed to strengthen the federal government's capacity to guarantee meaningful minority political participation.

But neither the Department of Justice, nor appropriate State and local agencies, have adequately addressed the current subtle and "ingenious" tactics employed at the local level which discriminate against and dilute black voter participation. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Indeed, in recent conversations between Legal Services attorneys representing clients and



Department of Justice officials, Agency personnel have candidly acknowledged that their contacts in North Carolina, until recently, were limited to one or two State Board of Election officials.

Prior to initiation of this pending action and other voting rights lawsuits filed in North Carolina, the Justice Department neither sought, nor encouraged direct communication with local black community leaders or elected officials with specific knowledge of elections practices. For these reasons, the Department has, through its own inactivity, remained insulated from and largely ignorant of the existing policies and practices carried out by election officials. These voting irregularities are present statewide and significantly diminish the power of black voters in this State. J.S. at 21a.

Disfranchisement mechanisms prevent or discourage people from voting and may be accomplished directly by law, or extra-legally. Davidson, *Minority Vote Dilution: An Overview* (reprinted in C. Davidson, *Ethnic Minority Vote Dilution* (1984)). Dilutionary mechanisms and practices continue to exist which prevent blacks from casting an effective ballot. Yet, North Carolina officials have failed to exercise the degree of active leadership necessary to overcome decades of black voter exclusion.

*Amicus*, in the representation of its clients in voting rights matters, has discovered the following discriminatory and dilutive voting practices in some counties in North Carolina, including some areas encompassed by House Districts 21, 36, 39, and Senate District 22.

The State Board of Elections, which supervises the local boards of elections, has not properly guided the local boards and performed its duty to ensure democratic participation by all citizens, as required by the United States Constitution and the Voting Rights Act. The local boards have consistently read State and federal voting regulations and laws with the narrowest interpretation.

But the State Board may train local election officials, issue directives on election procedures, decide election contests, or remove local board members. M. Crowell, *The Precinct Manual* (1984). It is responsible for the fair and honest conduct of all elections in the State. Since this lawsuit was filed, the State Board has begun to place some emphasis on black voter registration. J.S. at 25a.

Limited accessibility to voter registration opportunities and an extreme lack of cooperation by the local boards are the rule in many North Carolina counties. Despite protest from black democrats who comprise 33.6% of that county's voting age population, the Durham County Board of Elections is all white. (Px. 58) Racial membership on the county boards of elections is tightly controlled by recommendations of local political party chairs or, in the case of municipal boards, by city council representatives. Crowell, *supra*, at 5.

Voter registration has been hampered by the Durham Board's refusal to allow precinct registrars to register voters outside of the registrar's homes. Until the State Board intervened in 1982, registrars in the County could register only residents of their own precinct. (T p. 657, 553-55)

Since official barriers to black voter registration did not and do not completely disfranchise blacks, official acts at the polling place substantially contribute to the continued denial of equal voter participation by blacks. Many blacks are denied an opportunity to vote due to inordinate delays and long lines due to confusion by election officials, including failure to locate newly registered voters on official lists. Deliberate, or planned inefficiency by local boards is aimed at discouraging increased black voter participation. These techniques have included inadequate personnel to accommodate heavy voter turnout and having insufficient numbers of ballots available at predominantly black precincts.

Black voters are often erroneously directed to incorrect precincts. This misdirection has an enormous impact due



to timeliness, and more critically, the lack of available transportation (T p. 686), especially in the State's rural areas. There is a general lack of awareness of current local and national elections law requirements. As a partial response, the North Carolina Board of Elections has recently distributed a few rulings and guidelines, usually after official protest of voting irregularities by defeated black candidates. But as noted, the laws, rules and regulations are almost always narrowly defined, as applied to black voters at the local level.

In general, blacks have no immediate recourse for denial of the right to vote. Local precinct officials often are without authority or refuse to resolve disputes without clearance from the county Board of Elections. Due to the lack of time and transportation, as noted above, the referral of black citizens to County Boards of Elections offices (which may be as far away as 18 miles) results in denial of the right to vote. For example, over 27% of blacks, compared with about five percent of whites, have no vehicle available to them in Forsyth County. (Px 57; T. 634)

Often, precinct or Board of Elections officials may call into question the qualifications of a black citizen to register or vote. Most often challenges relate to the prospective voter's residency. There are procedures under North Carolina law for handling challenges by the Boards or at the polls. Crowell, *supra*, at 54-55. Yet, due apparently to lack of familiarity with this process, the challenged ballot procedure is not used frequently to permit exercise of the franchise in disputed situations. If election officials uphold a challenge by finding a voter is not qualified, he may still fill out a special ballot. Crowell, *supra*, at 56.

Assistance to voters guaranteed under State and federal law has been denied by poll officials in many North Carolina counties. The need for voter assistance is critical in this State with its high rate of adult illiteracy. Over a quarter of Forsyth and Mecklenburg counties' black

adults, for example, have only an eighth grade education or less. So blacks in these counties and elsewhere in the State enter the political process with a substantial handicap. (Px. 56-57)

North Carolina law permits assistance to any voter upon request by a near relative. State law also allows assistance to disabled, illiterate or elderly voters. Crowell, *supra*, at 40. Curbside voting is permitted for those physically unable to come into the polling place without help. *Id.* A new federal law authorizes aid to the handicapped or those unable to read. 42 U.S.C. 1973aa-6. The new federal law permits assistance to more than one voter by the same person. Repeated assistance to different voters had been allowed by poll officials even under the North Carolina law. During elections conducted in 1984, precinct officials issued confusing and conflicting rulings in response to requests for assistance by black voters. Precinct officials were warned "to avoid embarrassing the voter, especially if he is illiterate." Memorandum from the State Board of Elections to County Boards of Elections dated February 21, 1984. But many precinct officials demonstrated hostile, argumentative, rude and insensitive behavior, after receiving requests for assistance. Aid to voters was either arbitrarily permitted or denied with little or no explanation of the justification.

Conflicting interpretation over these and other voting rights issues has sometimes resulted in verbal confrontations between black voters and white poll workers. Use of uniformed officers is not unknown at some polling places, particularly in rural areas, to intimidate or harass black voters who question illegal practices.

Voting machines often malfunction due to poor maintenance in predominantly black precincts when the turnout is heavy. Precinct workers have been observed in such situations carrying ballots in their hands from one location to another in the polling place, contrary to State

ballot counting procedures. Obviously, these practices increase the possibility of ballot miscount.

Poll officials have also erroneously directed prospective voters to discard sample ballots and campaign literature before entering the voting enclosure. This misinterpretation of the "electioneering rule" has severely impacted on illiterate and newly registered voters confused by the lengthy and complicated North Carolina ballot.

Because of the aforementioned voting difficulties, many county boards of election are overwhelmed with complaints and problems on election day. The staff of these offices are unprepared to respond efficiently to black voter registration problems. Boards of election offices become bottlenecks to further impede black voter participation.

A measurable increase in black voter participation in North Carolina has sparked organized opposition and hostility among some election officials and others designed to further chill black voter participation. Racial appeals have historically been used in statewide elections. J.S. 31a-32a. In Durham County, for example, racial appeals have continued to the present as evidenced in the 1982 Congressional race and later in the 1984 race for the United States Senate. (T. 354; Px 51) Newspaper advertisements in the *Durham Morning Herald* have associated some candidates with striking black teachers in another state or alleged expenditures of State funds for black voter registration activities. A fundraising letter from one of the State's political party chairmen, mailed to 45,000 individuals, labeled an increase in new black voter registration "frightening" and "potentially disastrous." News and Observer, August 14, 1984, at 1, col. 1.

Rumors of an organized plan in North Carolina to challenge and disrupt allegedly improperly registered black voters abounded during the November, 1984 election. This strategy was termed a "ballot security" initiative by its supporters. These and other incidents have

caused political strategists to note the injection of racial issues into more recent North Carolina election campaigns. News and Observer, June 2, 1985, at 17A, col. 2.

Despite the pervasiveness of the barriers to black voter participation in the State, the Justice Department has only certified one North Carolina county for federal observers under provisions contained in the Voting Rights Act.

**C. The district court correctly considered electoral successes as one factor under the totality of circumstances standard.**

The district court did consider electoral successes. However, the district court correctly labeled these still limited and recent successes by minority candidates as uncharacteristic. J.S. at 37a. We agree, based upon our knowledge of the continuing gap between effective participation by black and white voters in the State. Of critical importance is that the 1982 successes were made after this lawsuit was filed in 1981. There are numerous reasons for the successes of the 1982 elections.

For example, two black candidates were elected to the General Assembly from Forsyth County in 1982. There was an unusually large number of white candidates with no white incumbents running. The election of blacks resulted from the whites spreading their votes among other whites, rather than more whites voting for blacks. Therefore, this will not be repeated and cannot serve as an indication that black citizens have as equal an opportunity as do whites to elect candidates of their choice. (T. 87)

As noted, the majority vote requirement is a critical tool for disfranchising blacks. J.S. at 52a. The rule forces a minority candidate who may have won a plurality to run against the second highest vote getter. Generally, the defeated white candidates organize their support for the top white vote getter, and the resultant runoff usually finds the black candidate defeated. In



order to offset the devastating effects of the majority vote requirements, blacks in 1982 relied heavily on single shot voting. Blacks cast one vote for one candidate (instead of the full party slate) to ensure their candidate's election, in the process, giving up their right to vote for other candidates. J.S. at 41a.

The "success" of the black voter participation in Durham County has been heavily dependent upon the extreme use of single shot voting. J.S. at 41a, 44a. Thus, the "success" of black candidates requires tradeoffs of other voter options. In 1982, single shot voting was prevalent in Forsyth County (House District 39), Mecklenburg County (House District 36), Durham County (House District 23) and Wake County (House District 21). (T p. 85, 1437)

In Forsyth County general elections of 1978 and 1980, black voters gave black candidates 34% and 24% of their votes, respectively. These black candidates lost. (T 613-622) However, black candidates won in 1982 when they received 95% of the black vote. (Px 15 (b) and 15 (d)) There was a sharp increase in concentration of voting by blacks in 1982 in Mecklenburg County. Despite that, only one of two black candidates was successful, even with an unusually low white and Republican turnout. (Tp. 144) Finally, single shot voting in 1980 was the primary reason that the first black was elected to the North Carolina House of Representatives from Wake County in this century. This candidate ran in 1978 and received 21% of the white vote, but was defeated. In 1982, as an incumbent, he received less than 40% of the white vote. (Stipulation 95, 97, T. 582, answer to Interrogatory #2)

Through critical sacrifices and hard choices, blacks may have limited successes. Whites do not have to make the same sacrifices and choices to ensure equal participation in the electoral process.

Clearly, the political participation level of Black citizens remains quite minimal. A few unique individuals, who have achieved professional status as lawyers, entrepreneurs or otherwise distinguished themselves from the generally lower socioeconomic lot of most blacks in North Carolina, can sometimes participate as candidates in the political process. These isolated and still rare instances of limited access to the political process by blacks cannot vitiate the still widespread racial vote dilution which continues to exist in North Carolina.

In many North Carolina communities such as Forsyth County, black leaders who have been outspoken about issues of concern to the black community cannot get white support, and thus cannot win at-large elections. (T. 625-626) Even a witness for appellants conceded that, if a black citizen in Forsyth County wanted to get elected, he would "have to keep [his] mouth shut." (Houser Dep. at 42-43) Thus in recruiting candidates for at-large elections, the black community must look for a "lightweight" (T. 625-626)

Similarly, the president of the Durham County Committee on the Affairs of Black People testified below that his organization limits recruitment of candidates to those who can appeal to the white community. Thus blacks, as opposed to whites, must be businessmen or lawyers and must start with high name recognition. (T. 665-666) Those who have been outspoken in support of unmet needs of the black community are not considered viable candidates.

The degree and extent of the above mentioned dilutive practices will, of course, vary from county to county. Of significance in comprehending these devices is their cumulative and combined effect. Under certain circumstances, the totality of impact may account for the loss of hundreds of votes denied to minority candidates. These votes would have provided the margin of victory to a



minority candidate in a 1984 primary election for an Edgecombe County commissioner's seat. No North Carolina county—and certainly not any of the districts which are the subject of this appeal—has completely rid itself of black voter and candidate discrimination.

### CONCLUSION

For the foregoing reasons, *Amicus*, Legal Services of North Carolina, respectfully requests that this Court affirm the judgment of the United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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August, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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LACY H. THORNBURG, *et al.*

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

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ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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MOTION FOR LEAVE TO FILE AND BRIEF OF  
SENATORS DENNIS DeCONCINI, ROBERT J. DOLE,  
CHARLES E. GRASSLEY, EDWARD M. KENNEDY,  
CHARLES McC. MATHIAS, JR., AND  
HOWARD M. METZENBAUM,  
AND REPRESENTATIVES DON EDWARDS, HAMILTON  
FISH, JR., PETER W. RODINO, JR., AND  
F. JAMES SENSENBRENNER  
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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No. 83-1968

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REPRESENTATIVES DON EDWARDS, HAMILTON  
FISH, JR., PETER W. RODINO, JR., AND  
F. JAMES SENSENBRENNER  
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON  
BEHALF OF APPELLEES

---

Amici Curiae are members of the United States Congress who were principal co-sponsors and supporters of amended Section 2 of the Voting Rights Act. 42 U.S.C. § 1973 (1982). Pursuant to Supreme Court Rule 36.3, amici respectfully request leave to file the accompanying amicus brief.\*

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\* Appellees have consented to amici's participation in this case. Appellants, however, have denied consent.



As members of the United States Senate and House of Representatives and the respective Judiciary Committees of the Senate and House, and as key co-sponsors of amended Section 2, amici are vitally interested in ensuring that the Voting Rights Act is properly interpreted. The position taken by the Solicitor General and appellants in this case is inconsistent with the literal provisions of Section 2. Moreover, it discounts the importance of the Senate Report, the key source of legislative history in this case. We are concerned both with preserving the integrity of Congressional Committee Reports and ensuring that Section 2 of the Voting Rights Act is preserved as an effective mechanism to ensure that people of all races will be accorded an equal opportunity to participate in the political processes of this country and to elect representatives of their choice.

The accompanying brief undertakes a detailed review of the language and legislative history of amended Section 2 of the Voting Rights Act, issues that the parties will not address in the same detail. Thus, amici believe that the perspective they bring to the issues in this case will materially aid the Court in reaching its decision.

Members of the House of Representatives and Senate have participated as amici curiae in numerous cases before this Court involving issues affecting the legislative branch, both by motion, e.g., *United States v. Helstoski*, 442 U.S. 477 (1979), and consent, e.g., *National Organization for Women v. Idaho*, 455 U.S. 918 (1982).

For the foregoing reasons, amici respectfully request leave to file the accompanying amicus brief.

Respectfully submitted,

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Dated: August 30, 1985

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WARDS, HAMILTON FISH, JR., PETER W. RODINO,  
JR., AND F. JAMES SENSENBRENNER AS *AMICI*  
*CURIAE* IN SUPPORT OF APPELLEES

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---

Senators Dennis DeConcini, Robert J. Dole, Charles E. Grassley, Edward M. Kennedy, Charles McC. Mathias, Jr., and Howard M. Metzenbaum, and Representatives Don Edwards, Hamilton Fish, Jr., Peter W. Rodino, Jr., and F. James Sensenbrenner hereby appear as amici curiae pursuant to the motion filed herewith.

### STATEMENT OF INTEREST

This case presents an important issue of interpreting the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, as

they pertain to Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. As members of the United States House of Representatives and Senate, amici are vitally interested in this case, which could determine whether Section 2 is to be preserved as an effective mechanism to ensure that people of all races will be accorded an equal opportunity to participate in the political processes of this country and in the election of representatives of their choice. This case also raises an important question of the weight to be given congressional committee reports by which the intent underlying a statute is expressed.

Members of the House of Representatives and Senate have participated as amici curiae in numerous cases before this Court involving issues affecting the legislative branch, both by motion, e.g., *United States v. Helstoski*, 442 U.S. 477 (1979), and consent, e.g., *National Organization for Women v. Idaho*, 455 U.S. 918 (1982).

### SUMMARY OF ARGUMENT

As the authors and principal proponents of the 1982 amendments to Section 2, our primary concern in this case is to ensure that Section 2 is interpreted and applied in a manner consistent with Congress' intent. The Solicitor General and the appellants contend that the district court's finding that the challenged multimember legislative districts violated Section 2 of the Voting Rights Act "cannot be reconciled" with the evidence of some recent electoral success by black candidates in those districts. Brief for the United States as Amicus Curiae 24, 28.

The three-judge district court, using the "totality of circumstances" analysis made relevant by Section 2, found blacks were denied an equal opportunity to participate in the political process in the challenged districts on the basis of a wide variety of factors. It considered the evidence of electoral success at length in its opinion, and found such successes to be "too minimal in total numbers" and of "too recent" vintage to support a finding that black candidates were not disadvantaged

because of their race. *Gingles v. Edmisten*, 590 F. Supp. 345, 367 (E.D.N.C. 1984). Appellants and the Solicitor General, on the other hand, ascribing definitive weight to a single factor, argue that "given the proven electoral success that black candidates have had under the multimember system," no violation of Section 2 can be established. Brief for the United States as Amicus Curiae 28.

The Solicitor General and appellants seemingly ask this court to rule that evidence of recent, and limited, electoral success should be preclusive of a Section 2 claim, though evidence of other factors overwhelmingly may compel a finding that blacks are denied an equal opportunity to participate in the political process. This position is contrary to the express terms of Section 2, which requires a comprehensive and realistic analysis of voting rights claims, and it could raise an artificial barrier to legitimate claims of denial of voting rights which in some ways would pose as significant an impediment to the enforcement of Section 2 as the specific intent rule of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), rejected by Congress in 1982.

To assume that some electoral success by some members of a minority group, no matter how limited or incidental such success may be, conclusively evidences an equal opportunity for members of that group, confuses the occasional success of black candidates with the statutory guarantee of an equal opportunity for black citizens to participate in the political process and to elect candidates of their choice. Experience, as documented by the pre-*Bolden* case law, proves that the systematic denial of full and equal voting rights to blacks may be accompanied by the sporadic success of some blacks in primary or general elections. As the courts have uniformly recognized, the vice of the denial of equal voting rights to a minority group is not obviated by such token or incidental successes of its members.

Most importantly, the position advocated by the Solicitor General and appellants is inconsistent with the literal language of Section 2, and was expressly rejected by Congress when it considered the 1982 amendments, as is made clear in the



Report of the Senate Judiciary Committee on S. 1992, S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (hereinafter the "Senate Report"). This Report cannot be treated as the view of "one faction in the controversy," as argued in the amicus brief of the Solicitor General (Brief for the United States as Amicus Curiae 8 n.12), in the face of clear evidence that the Report accurately expresses the intent of Congress generally, and importantly of the authors of the compromise legislation that was reported by the Senate Judiciary Committee and enacted, essentially unchanged, into law.

If this Court were to discount the importance of the views expressed in the Senate Report, it would have significance beyond this particular case. A majority of the Judiciary Committee sought to provide, in the Senate Report, a detailed statement of the purpose and effect of the 1982 amendments. That statement was relied upon by members of the Senate in approving the legislation, and by members of the House in accepting the Senate bill as consistent with the House position. This Court should not cut the 1982 amendments free from their legislative history, and adopt an interpretation of that legislation inconsistent with the view of the congressional majority. To do so would undermine firmly established principles of interpretation of Acts of Congress, and sow confusion in the lower courts that are so often called upon to determine the legislative intent of federal statutes.

The Voting Rights Act Amendments of 1982 were intended to reinstate fair and effective standards for enforcing the rights of minority citizens so as to provide full and equal participation in this nation's political and electoral processes. In 1982, Congress had before it an extensive record showing that much had been accomplished towards this end since the Voting Rights Act was adopted in 1965, but that much more remained to be done. In construing and applying Section 2, the Court should be mindful of Congress' remedial goal to overcome the various impediments to political participation by blacks and other minority groups.

## ARGUMENT

### I. TO ASSUME COMPLIANCE WITH SECTION 2 UPON EVIDENCE OF SOME ELECTORAL SUCCESS BY MEMBERS OF A MINORITY GROUP VIOLATES THE LITERAL REQUIREMENTS OF THAT PROVISION; EVIDENCE OF SOME ELECTORAL SUCCESS MUST BE VIEWED AS PART OF THE "TOTALITY OF CIRCUMSTANCES" TO BE CONSIDERED

The evidence of some electoral success by blacks in the challenged districts in North Carolina is not dispositive of a Section 2 claim, as is evident from the plain language of the statute.<sup>1</sup> Section 2 requires that claims brought thereunder be analyzed on the basis of the "totality of circumstances" present

<sup>1</sup> We make no effort herein to state the facts at issue in this case in a complete manner, though we do note the limited nature of black electoral success as presented in the district court's findings:

House District No. 36 (Mecklenburg County) and Senate District No. 22 (Mecklenburg and Cabarrus Counties)—Only two black candidates have won elections in this century. One black won a seat in the eight member House delegation in 1982 after this litigation was filed (running without white opposition in the Democratic primary), and one served in the four-member Senate delegation from 1975-1980. This limited success is offset by frequent electoral defeats. In House District 36, seven black candidates have tried and failed to win seats from 1965-1982, and in Senate District 22 black candidates failed in bids for seats in 1980 and 1982. Blacks comprise approximately 25 percent of the population in these Districts. 590 F. Supp. at 357, 365.

House District No. 39 (part of Forsyth County)—The first black to serve as one of the five-member delegation served from 1975-1978. He resigned in 1978 and his appointed successor ran for reelection in 1978 but was defeated; a black candidate was also defeated in 1980. In 1982, after this litigation was filed, two blacks were elected to the House. This pattern of election, followed by defeats, mirrors elections for the Board of County Commissioners, in which the only black elected was defeated in her first reelection bid in 1980, and for elections to the Board of Education, in which the first black elected was defeated in his bids for reelection in 1978 and 1980. Blacks comprise 25.1 percent of the County's population. 590 F. Supp. at 357, 366.

House District No. 23 (Durham County)—Since 1973, one black has been elected to the three-member delegation. He faced no white opposition

*(footnote continues)*

in the challenged district. The focus is on whether there is equal access to the process. The extent of past black electoral success is only one relevant circumstance.

The controlling provision is Section 2(b), which states:

"A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

This express statutory provision clarifies that the "extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered . . . ." Obviously, other factors which comprise the "totality of circumstances" surrounding the political process must also be considered, as they were by the district court in finding a violation of Section 2 here. See Section III,

(footnote continued)

in the primary in 1980 or 1982 and no substantial opposition in the general election either of those years. Blacks constitute 36.3 percent of the population of the county. 590 F. Supp. at 357, 366, 370-71.

House District No. 21 (Wake County)—The first time in this century a black candidate successfully ran for the six-member delegation was in 1980. That same candidate had been defeated in 1978. Blacks comprise 21.8 percent of the population of the county. 590 F. Supp. at 357, 366, 371.

House District No. 8 (Wilson, Edgecomb and Nash Counties)—No black was ever elected to serve from this four-member district although it is 39.5 percent black in population. 590 F. Supp. at 357, 366, 371.

*infra*. Electoral success is a relevant criterion, but not the sole or dominant concern, as posited by the Solicitor General.<sup>2</sup>

As will be shown below, the primary reason Congress adopted Section 2(b), which originally was offered as a clarifying amendment by Senator Dole, was to ensure that the focus of the Section 2 "results" standard would be on whether there was equal opportunity to participate in the electoral process.

The statutory language necessarily contemplates that a Section 2 violation may be proven despite some minority candidate electoral success. The focus on the "extent" of minority group electoral success contemplates gradations of success—from token or incidental victories to electoral domination—and makes clear that a violation of Section 2 may be proven in cases where some members of the group have been elected to office, but the group nevertheless has been denied a full-scale equal opportunity to participate in the political process.<sup>3</sup>

Because Section 2 is plain on its face, it should not be necessary to look further to the legislative history. *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980), quoting *TVA v. Hill*, 437

<sup>2</sup> The Solicitor General seems to suggest that black electoral success in rough proportion to the black proportion of the population should be preclusive of a Section 2 claim. Brief for the United States as Amicus Curiae 24-25. At most, this argument appears relevant only to House District No. 23 (Durham County), and, in any event, is plainly inconsistent with Congress' clearly stated intent that Section 2 claims should not depend upon the race of elected officials. Section 2 seeks to deflect excessive concern with the racial or ethnic identity of individual officeholders and, instead, to focus attention where it properly belongs: on the existence of an equal opportunity for members of the minority group to participate in the political process and to elect representatives of their choice.

<sup>3</sup> Consistent with this clear statutory mandate, and the legislative history discussed below, the lower courts which have considered this issue all have expressly rejected the position espoused by the Solicitor General and appellants. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571-72 (11th Cir.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 375 (1984) ("It is equally clear that the election of one or a small number of minority elected officials will not compel a finding of no dilution."); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984).



U.S. 153, 184 n.29 (1978). Nevertheless, we will examine that history because it confirms, in the most unequivocal terms, the intent of Congress that the extent of minority group electoral success be analyzed as a part of the totality of circumstances from which to measure the openness of the challenged political system to minority group participation. Further, that history provides an important indication of the manner in which such analysis should be undertaken, and supports the analysis and conclusions of the court below.

## II. THE LEGISLATIVE HISTORY OF THE 1982 AMENDMENTS AND THE PRE-*BOLDEN* CASE LAW CONCLUSIVELY DEMONSTRATE THAT A VIOLATION OF SECTION 2 MAY BE FOUND ALTHOUGH MEMBERS OF A MINORITY GROUP HAVE EXPERIENCED LIMITED ELECTORAL SUCCESS

### A. The Legislative History: The Majority Statement in the Senate Report Specifically Provides that Some Minority Group Electoral Success Does Not Preclude a Section 2 Claim if Other Circumstances Evidence a Lack of Equal Access

The legislative history of the 1982 amendments shows very clearly that Congress did not intend that limited electoral success by a minority would foreclose a Section 2 claim. This intent is most plainly stated in the Senate Report, but a similar intent also is evident from the House deliberations, the individual views of members of the Senate Judiciary Committee appended to the Senate Report, and the floor debates in the Senate.

The 1982 amendments originated in the House, which initially determined that the *Bolden* intent test was unworkable, and that it was necessary to evaluate voting rights claims

brought under Section 2 on the basis of "[a]n aggregate of objective factors."<sup>4</sup> Report of the House Committee on the Judiciary on H.R. 3112, H.R. Rep. No. 227, 97th Cong., 1st Sess. 30 (1981) (hereinafter the "House Report"). As would the Senate, the House rejected the position that any single factor should be determinative of a Section 2 claim. The House Report noted that "[a]ll of these [described] factors need not be proved to establish a Section 2 violation." *Id.* at 30. Thus, while the House bill did not by its terms require the consideration of the "totality of circumstances," that plainly was the intent of the House.

The Senate refined the House bill, and made explicit the intent that Section 2 claims be addressed on the basis of the "totality of circumstances." This refinement came about because of a compromise authored by Senator Dole and others, the import of which will be addressed in detail below. Of immediate significance, though, is the fact that the Senate Report explaining this compromise expressly dealt with the issue of the significance of minority group electoral success to Section 2 claims. Indeed, the intent of the Committee with regard to the handling of this factor was expressed more than once.

The Senate Report includes, as one "typical factor" to consider in determining whether a violation has been established under Section 2, "the extent to which members of the minority group have been elected to public office in the jurisdiction." Senate Report at 29. Additional important commentary with regard to this factor is then provided:

"The fact that no members of a minority group have been elected to office over an extended period of time

<sup>4</sup> Relevant factors, drawn from the Court's decision in *White v. Regester*, 412 U.S. 755 (1973), and its progeny included "a history of discrimination affecting the right to vote, racially polarity [sic] voting which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, a majority vote requirement, a prohibition on single-shot voting, and numbered posts which enhance the opportunity for discrimination, and discriminatory slating or the failure of minorities to win party nomination." House Report 30.



is probative. However, the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a 'safe' minority candidate. 'Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. . . . Instead we shall continue to require an independent consideration of the record.' *Ibid.*" Senate Report at 29 n.115. (References are to *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).)

No clearer statement of the intent of the Committee with regard to this issue seems possible. See *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984) ("In the Senate Report . . . it was specifically noted that the mere election of a few minority candidates was not sufficient to bar a finding of voting dilution under the results test.").<sup>5</sup>

Further, this analysis, and its reliance on *Zimmer v. McKeithen*, 485 F.2d at 1307, is consistent with the express view of the Committee that "[t]he 'results' standard is meant to restore the pre-*Mobile* legal standards which governed cases

<sup>5</sup> The Solicitor General suggests that this statement indicates that minority group electoral success will not defeat a Section 2 claim *only* if it can be shown that such success was the result of the majority "engineering the election of a 'safe' minority candidate." Brief for the United States as Amicus Curiae 24 n.49. Amici, who were integrally involved in writing the Senate Report, view this statement as providing an example which illustrates why some success should not be dispositive, not a legal rule defining the only circumstance where it is not. Of course, there are numerous other reasons why some electoral success might not evidence an equality of opportunity to participate in the electoral process. For example, as in the instant case, the ability to single-shot vote in multimember districts may produce some black officeholders, but at the expense of denying blacks the opportunity to vote for a full slate of candidates. See 590 F. Supp. at 369.

challenging election systems or practices as an illegal dilution of the minority vote. Specifically, subsection (b) embodies the test laid down by the Supreme Court in *White [v. Regester]*, 412 U.S. 755 (1973).<sup>6</sup> This reliance on pre-*Bolden* case law is important, for it was firmly established under that case law that a voting rights violation could be established even though members of the plaintiff minority group had experienced some electoral success within the challenged system.

The Committee was acutely aware of this precedent.<sup>7</sup> Indeed, in the case set by Congress as the polestar of Section 2 analysis—*White v. Regester*—a voting rights denial was found by this Court despite limited black and Hispanic electoral success in the challenged districts in Dallas and Bexar Counties in Texas. Senate Report at 22.<sup>8</sup>

<sup>6</sup> There can be no doubt that this was the view of a Congressional majority as well. Thus, in his additional views, Senator Dole remarked that "the new subsection [2(b)] codifies the legal standard articulated in *White v. Regester*, a standard which was first applied by the Supreme Court in *Whitcomb v. Chavis*, and which was subsequently applied in some 23 Federal Courts of Appeals decisions." Senate Report at 194. Senator Grassley, in his supplemental views, similarly remarked that "the new language of Section 2 is the test utilized by the Supreme Court in *White*." *Id.* at 197.

<sup>7</sup> The Senate Report states:

"What has been the judicial track record under the 'results test'? That record received intensive scrutiny during the Committee hearings. The Committee reviewed not only the Supreme Court decisions in *Whitcomb* [sic] and *White*, but also some 23 reported vote dilution cases in which federal courts of appeals, prior to 1978, followed *White*." Senate Report at 32.

A list and analysis of these 23 cases appears in *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary*, Vol. I, 97th Cong., 2d Sess. 1216-26 (1982) (hereinafter "I Senate Hearings") (appendix to prepared statement of Frank R. Parker, director, Voting Rights Project, Lawyers' Committee for Civil Rights Under the Law).

<sup>8</sup> The Senate Report cites the portion of this Court's opinion in *White v. Regester* wherein it was observed that "[s]ince Reconstruction, only two black candidates from Dallas County had been elected to the Texas House of Representatives, and these two were the only blacks ever slated by the Dallas Committee for Responsible Government, white-dominated slating group."

(footnote continues)

The Committee also expressly relied upon the opinion of the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen*, which it described as "[t]he seminal court of appeals decision . . . subsequently relied upon in the vast majority of nearly two dozen reported dilution cases." Senate Report at 23. In *Zimmer*, the Circuit Court found inconclusive the fact that three black candidates had won seats in the challenged at-large district since the institution of the suit. The Court reasoned that while the appellee urged that "the attendant success of three black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote . . . . [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote." 485 F.2d at 1307.

Similarly, the Committee considered with approval a recent case involving Edgefield County, South Carolina, where prior to *Bolden* a voting rights violation had been found, despite limited black electoral success, because "[b]lack participation in Edgefield County has been merely tokenism and even this has been on a very small scale." *McCain v. Lybrand*, No. 74-

(footnote continued)

412 U.S. at 766-67. The decision of the district court indicates that the first of these candidates ran in 1966, and that they were selected by the white-dominated Dallas Committee for Responsible Government without the participation of the black community. *Graves v. Barnes*, 343 F. Supp. 704, 726 (W.D. Tex. 1972), *aff'd in part and rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973).

A similar point was made with respect to Hispanic success in Bexar County, where "[o]nly five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County. Of these, only two were from the barrio area." 412 U.S. at 768-69. The district court indicated that four of these five were elected after 1960. *Graves v. Barnes*, 343 F. Supp. at 732.

The findings in *White v. Regester* seem unremarkable until it is realized that in the instant case the same or a lesser showing of black electoral success in all of the districts here at issue (except House District No. 23), is being relied upon as conclusive evidence that no voting rights violation has occurred.

281, slip op. at 18 (D.S.C. April 17, 1980), *quoted* at Senate Report 26.<sup>9</sup>

There is absolutely no indication in the legislative history that *any* member of either House of Congress thought that evidence of minority group electoral success should be preclusive of a Section 2 claim. The Solicitor General and appellants recite at some length numerous statements to the effect that Section 2 was not meant to require proportional representation. This point is made on the face of the statute, and there is no question that Section 2 does not require that minority group representation be, at a minimum, equal to the group's percentage of the population. However, the finding of a violation of Section 2 in the face of some minority group electoral success does not depend upon a rule requiring proportional representation. Rather, as the reasoning of the court below illustrates, the finding of a violation depends upon the assessment of the "totality of circumstances" to determine whether members of the minority group have been denied an equal opportunity to participate in the political process and to

<sup>9</sup> In addition, there are other pre-*Bolden* decisions of similar import not specifically addressed in the Senate Report or in the floor debates. So, in one of the 23 appellate decisions studied by the Committee, the Fifth Circuit Court, rejecting a reapportionment plan ordered by the district court because it left the chances for black success unlikely, noted its continuing adherence to the *Zimmer* rule: "we add the caveat that the election of black candidates does not automatically mean that black voting strength is not minimized or canceled out." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 149 n.21 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

This rule of common sense was respected by the district courts. For example, in *Graves v. Barnes*, 378 F. Supp. 641, 659-61 (W.D. Tex. 1974), the court concluded that the recent election of Hispanics to the Texas House of Representatives and to the school board did not frustrate a voting rights claim.

Similarly, a district court refused in *Beer v. United States*, 374 F. Supp. 363 (D.D.C. 1974), *rev'd on other grounds*, 425 U.S. 130 (1976), to deem the city of New Orleans to be entitled to pre-clearance under Section 5 despite a showing that four blacks recently had won elective office in the municipality. Although the Section 5 retrogression standard differs from the Section 2 standard, *Beer* is relevant to the case at hand in that the Court recognized that minority candidate success can be attributable to factors other than equal access to the electoral process by minority group members.



elect representatives of their choice. The disproportionality of minority group representation is, at most, one factor in the analysis.

**B. The Majority Statement in the Senate Report Is an Accurate Statement of the Intent of Congress with Regard to the 1982 Amendments**

The Solicitor General appears to believe that Congress intended to adopt in 1982, the rule rejected in *Zimmer v. McKeithen*, drawing from certain statements by amicus Senator Dole and others that Section 2 was not intended to require proportional representation, an inference that a Section 2 claim is foreclosed wherever limited electoral success is shown. See Brief for the United States as Amicus Curiae 11-14.<sup>10</sup>

In making this argument, the Solicitor General also argues, as he did in another recent appeal to this Court regarding a Section 2 claim, *City Council of Chicago v. Ketchum*, 105 S. Ct. 2673 (1985), that the Senate Report is not determinative of the intent of Congress, and attaches greater significance to the individual views of amici Senators Dole and Grassley, and Senator Hatch.<sup>11</sup> Brief for the United States as Amicus Curiae,

<sup>10</sup> The Solicitor General also cites the Report of the Subcommittee on the Constitution to the Senate Committee on the Judiciary on S. 1992, 97th Cong., 2d Sess. (1982) ("Subcommittee Report"). The Subcommittee Report does not reflect, nor does it purport to reflect, the views of the Congressional majority who favored overturning the *Bolden* intent test and reinstating a results test. *Id.* at 20-52. At the time the Subcommittee Report was written, a 3-2 majority of the Senate Subcommittee supported existing law, a position squarely rejected by the full Committee and by the Senate as a whole. The Chairman of the Subcommittee—Senator Orrin Hatch—opposed the Dole compromise and voted for the bill ultimately enacted only with great reluctance, continuing to state until the final vote on the bill his view "that these amendments promise to effect a destructive transformation in the Voting Rights Act. . . ." 128 Cong. Rec. S7139 (daily ed. June 18, 1982). Of the four other members of the Subcommittee: Senator Strom Thurmond opposed the Dole compromise; Senator Charles Grassley supported the compromise, and, as noted below, expressly acceded to the majority view of the Senate Report; and Senators Dennis DeConcini and Patrick Leahy objected to the conclusions of the Subcommittee Report.

<sup>11</sup> As noted in the preceding footnote, while Senator Hatch did ultimately vote for the bill, he opposed the Dole compromise in Committee and voiced opposition to it on the floor of the Senate.

13 n.27. These efforts are misguided on both factual and legal grounds.

**1. The Majority Statement in the Senate Report Plainly Reflects the Intent and Effect of the Legislation**

To understand the significance of the majority view stated in the Senate Report, and of the individual views of amici Senators Dole and Grassley, it is necessary to understand the nature and the genesis of what is aptly termed the Dole compromise. The purpose of the compromise was to clarify what standard should be used under the results test to ensure that the amended Section 2 would not be interpreted by courts to require proportional representation. The bill originally adopted by the House—H.R. 3112—attempted to accomplish this with a disclaimer that "[t]he fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." In addition, the stated purpose of the House bill was to reinstate the standards of pre-*Bolden* case law, which was understood by the House not to require proportional representation. House Report at 29-30.

The House bill attracted immediate support in the Senate. Senators Mathias and Kennedy introduced the House bill as S. 1992, and enlisted the support of approximately two-thirds of the members of the Senate as co-sponsors.<sup>12</sup> Still, certain members of the Senate, and, in particular Senator Dole, had lingering doubts as to whether the language of the House bill was sufficient to foreclose the interpretation of the Voting Rights Act as requiring proportional representation. To ame-

<sup>12</sup> Initially S. 1992 had 61 co-sponsors, and by the time the Senate Judiciary Committee passed upon the Dole compromise, this number had grown to 66. Thus, as Senator Dole himself recognized in Committee deliberations, "without any change the House bill would have passed." Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at *Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, Vol. II, 97th Cong., 2d Sess. 57 (1982) (hereinafter "II Senate Hearings").



liorate this concern, Senator Dole—in conjunction with Senators Grassley, Kennedy and Mathias, among others<sup>13</sup>—proposed that Section 2(b) be added to pick up the standard enunciated by this Court in *White v. Regester*. In addition, the disclaimer included in the House bill was strengthened to state expressly that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.”

As Senator Dole himself was careful to emphasize, the compromise was consistent with the Section 2 amendments passed by the House.<sup>14</sup> As Senator Joseph Biden explained in the Committee debate over the Dole compromise, “What it does [is], it clarifies what everyone intended to be the situation from the outset.” Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at II Senate Hearings 68. In introducing S. 1992 on the floor, Senator Mathias also termed the Committee actions on Section 2 “clarifying amendment[s]” which “are consistent with the basic thrust of S. 1992 as introduced and are helpful in clarifying the basic meaning of the proposed amendment.” 128 Cong. Rec. S6942, S6944 (daily ed. June 17, 1982).<sup>15</sup>

<sup>13</sup> Senator Dole explained that he “along with [amici] Senators DeConcini, Grassley, Kennedy, and Metzenbaum and Senator Mathias . . . had worked out a compromise on [Section 2].” *Id.* at 58.

<sup>14</sup> Thus, Senator Dole explained the proposed compromise as follows:

“[T]he compromise retains the results standards of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2, which codified language from the 1973 Supreme Court decision of *White v. Regester*.” Executive Session of the Senate Judiciary Committee, May 4, 1982, reported at II Senate Hearings, 60.

See also *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1565 n.30 (11th Cir.), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 375 (1984).

<sup>15</sup> A similar understanding of the Senate bill was expressed on the floor of the House by Representative Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary:

(footnote continues)

The authors of the compromise—in particular amici Senators Dole and Grassley—did not perceive it as inconsistent with the majority view of the proposed legislation. Indeed, in additional comments to the Senate Report, both amici Senators Dole and Grassley clearly stated that they thought the majority statement to be accurate. Thus, Senator Dole prefaced his additional views with the comment that “[t]he Committee Report is an accurate statement of the intent of S. 1992, as reported by the Committee.”<sup>16</sup> Senate Report at 193. And Senator Grassley prefaced his views with the cautionary remark that “I express my views not to take issue with the body of the Report.” Senate Report at 196. So that there could be no doubt as to his position, he later added that “I concur with the interpretation of this action in the Committee Report.” Senate Report at 199. Moreover, the individual views expressed by both these Senators were in complete accord with the majority statement.<sup>17</sup>

(footnote continued)

“Basically, the amendments to H.R. 3112 would . . . clarify the basic intent of the section 2 amendment adopted previously by the House.

“These members [the sponsors of the Senate compromise] were able to maintain the basic integrity and intent of the House-passed bill while at the same time finding language which more effectively addresses the concern that the results test would lead to proportional representation in every jurisdiction throughout the country and which delineates more specifically the legal standard to be used under section 2.” 128 Cong. Rec. H3840-3841 (daily ed. June 23, 1982).

<sup>16</sup> As Senator Dole stated in his additional views, his primary purpose in offering the compromise was to allay fears about proportional representation and thereby secure the overwhelming bipartisan support he thought the bill deserved. For this reason, his comments primarily were concerned with stressing the intent of the Committee that the results test and the standard of *White v. Regester* should not be construed to require proportional representation. Senate Report at 193-94. This in no way suggests that he disagreed with the views expressed in the majority report, for that report also went to great pains to explain that neither the results test nor the standard of *White v. Regester* implied a guarantee of proportional representation. Senate Report at 30-31. A disclaimer to the same effect appears, of course, on the face of the statute.

<sup>17</sup> Senator Dole objected to efforts by opponents to redefine the intent of the 1982 amendments on the floor of the Senate. See 128 Cong. Rec. S6553 (daily ed. June 9, 1982).

Both proponents and opponents of S. 1992 recognized in the floor debates the significance of the majority statement in the Committee Report as an explanation of the bill's purpose. So, early on in the debates Senator Kennedy noted that:

"Those provisions, and the interpretation of those provisions, are spelled out as clearly and, I think, as well as any committee report that I have seen in a long time in this body.

"I have spent a good deal of time personally on this report, and I think it is a superb commentary on exactly what this legislation is about.

"In short, what this legislative report points out is who won and who lost on this issue. There should be no confusion for future generations as to what the intention of the language was for those who carried the day." 128 Cong. Rec. S6553 (daily ed. June 9, 1982).<sup>18</sup>

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<sup>18</sup> Senator Kennedy reemphasized this point a week later:

"If there is any question about the meaning of the language, we urge the judges to read the report for its meaning or to listen to those who were the principal sponsors of the proposal, not to Senators who fought against the proposal and who have an entirely different concept of what a Voting Rights Act should be."

128 Cong. Rec. S6780 (daily ed. June 15, 1982).

An admonition which Senator Dole heartily echoed:

"I join the Senator from Massachusetts in the hope that when the judges look at the legislative history, they will look at those who supported vigorously and enthusiastically the so-called compromise."

128 Cong. Rec. S6781 (daily ed. June 15, 1982).

Senator Kennedy later remarked to the same effect:

"Fortunately, I will not have to be exhaustive because the Senate Judiciary Committee Report, presented by Senator Mathias, was an excellent exposition of the intended meaning and operation of the bill."

128 Cong. Rec. S7095 (daily ed. June 18, 1982).

Thus, the proponents of the legislation, including Senators Dole,<sup>19</sup> Grassley,<sup>20</sup> DeConcini,<sup>21</sup> Mathias,<sup>22</sup> and Kennedy,<sup>23</sup> repeatedly pointed their colleagues to the majority statement of the Senate Report for an explanation of the legislation. Conversely, opponents of the compromise,<sup>24</sup> or proponents of particular amendments,<sup>25</sup> looked to the majority statement of the Senate Report as a basis for their individual criticisms of the bill. At no point in the debates did any Senator claim that the majority statement of the Senate Report was inaccurate, or that it represented the peculiar views of "one faction in the controversy."

Respect for the majority statement of the Senate Report carried to the floor of the House during the abbreviated debate on the Senate bill. Thus, amicus Representative F. James Sensenbrenner explained to his colleagues:

"First, addressing the amendment to section 2, which incorporates the 'results' test in place of the 'intent' test set out in the plurality opinion in *Mobile* against Bolden, there is an extensive discussion of how this test is to be applied in the Senate committee report." 128 Cong. Rec. H3841 (daily ed. June 23, 1982).

Again, there is no suggestion by any member of the House that the majority statement in the Senate Report was less than an accurate statement of the intent of Congress with regard to the bill.

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<sup>19</sup> 128 Cong. Rec. S6960-62, S6993 (daily ed. June 17, 1982).

<sup>20</sup> 128 Cong. Rec. S6646-48 (daily ed. June 10, 1982).

<sup>21</sup> 128 Cong. Rec. S6930-34 (daily ed. June 17, 1982).

<sup>22</sup> 128 Cong. Rec. S6941-44, S6967 (daily ed. June 17, 1982).

<sup>23</sup> 128 Cong. Rec. S6995 (daily ed. June 17, 1982); S7095-96 (June 18, 1982).

<sup>24</sup> 128 Cong. Rec. S6919-21, S6939-40 (daily ed. June 17, 1982); S7091-92 (June 18, 1982).

<sup>25</sup> 128 Cong. Rec. S6991, S6993 (daily ed. June 17, 1982). The amendment offered by Senator Stevens is particularly noteworthy—it concerned the application of the standards of Section 2(b) in pre-clearance cases—because he largely sought to justify it on the basis of a consistent statement in the Senate Report.



## 2. As a Matter of Law, the Majority Statement in the Senate Report Is Entitled to Great Respect

Under fundamental tenets of statutory construction, Committee Reports are accorded the greatest weight as the views of the Committee and of Congress as a whole.

In the preceding term, this Court reaffirmed the long-established principle that committee reports are the authoritative guide to congressional intent:<sup>26</sup>

"In surveying legislative history we have repeatedly stated that the authoritative source for finding the legislature's intent lies in the Committee reports on the bill, which 'represent [ ] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' *Zuber v. Allen*, 396 U.S. 168, 186 (1969)."

*Garcia v. United States*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 479, 483 (1984); accord *Chandler v. Roudebush*, 425 U.S. 840, 859 n.36 (1976); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *United States v. O'Brien*, 391 U.S. 367, 385 (1968); *United States v. International Union of Automobile Workers*, 352 U.S. 567, 585 (1957). The *Garcia* Court also reiterated the principle that committee reports provide "more authoritative" evidence of congressional purpose than statements by individual legislators. *Garcia*, 105 S. Ct. at 483; *United States v. O'Brien*, 391 U.S. at 385; cf. *United States v. Automobile Workers*, 352 U.S. at 585.

In light of these well-established principles, the effort to undermine the value of the Committee Report as a guide to legislative intent by citation to statements made during floor debates is misguided. Committee reports are "more authoritative" than statements by individual legislators, regardless of

<sup>26</sup> Consistent with this longstanding principle, the Senate Report has been the authoritative source of legislative history relied on by courts interpreting the 1982 Voting Rights Act Amendments. See, e.g., *McMillan v. Escambia County*, 748 F.2d 1037 (11th Cir. 1984); *United States v. Dallas County Comm'n*, 739 F.2d 1529 (11th Cir. 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 105 S. Ct. 375 (1984); *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984).

the fact that the individual legislator is a sponsor or floor manager of the bill. See *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 832-33 n.28 (1983); *Chandler v. Roudebush*, 425 U.S. at 859 n.36; *Monterey Coal v. Federal Mine Safety & Health Review Commission*, 743 F.2d 589, 596-98 (7th Cir. 1984); *Sperling v. United States*, 515 F.2d 465, 480 (3d Cir. 1975), cert. denied, 462 U.S. 919 (1976).<sup>27</sup>

The basis for this rule is quite simple, for to give controlling effect to any legislator's remarks in contradiction of a committee report "would be to run too great a risk of permitting one member to override the intent of Congress. . . ." *Monterey Coal v. Fed. Mine Safety & Health Review*, 743 F.2d at 598. The rule also reflects the traditions and practices of both Houses of Congress, in which members customarily rely on the report of the committee of jurisdiction to provide an authoritative explanation of the purpose and intent of legislation before any floor consideration begins. For example, the Senate Rules forbid the consideration of "any matter or measure reported by any standing committee . . . unless the report of that committee upon that matter or measure has been available to members for at least three calendar days . . . prior to the consideration . . ." Rule XVII, para. 5, Standing Rules of the Senate. In this way, each member has the opportunity to examine not only the text of proposed legislation, but also the explanation and justification for it, well in advance of any vote on the bill. By contrast, the vast majority of members may be completely unaware of the content of a statement made during

<sup>27</sup> In *National Association of Greeting Card Publishers*, the Court ruled that a statement by the floor managers of a bill, appended to the conference committee report, lacked "the status of a conference report, or even a report of a single House available to both Houses." 462 U.S. at 832 n.28. The Court in *Chandler v. Roudebush* held a committee report to be "more probative of congressional intent" than a statement by Senator Williams, the sponsor of the legislation. 425 U.S. at 859 n.36. In *Monterey Coal*, the court noted that the sponsor's statements "are the only mention in the legislative history of the specific issue before us." *Monterey Coal v. Fed. Mine Safety & Health Review*, 743 F.2d at 596. Nevertheless, because the sponsor's position was not "clearly supported by the conference committee report," the court declined to give the sponsor's remarks controlling weight. 743 F.2d at 598.



floor debates. It is impossible to determine from the official record of congressional proceedings whether a given member, or a majority or any particular number of members, was present when a certain statement was made. It is even customary for statements to be delivered orally only in part, with the balance printed in the *Congressional Record* "as if read." Given these facts, well known to amici from their decades of experience in both Houses, there is little basis for concluding that any given statement made in floor debate accurately states the intent of any member other than the one who made it.<sup>28</sup>

Furthermore, the "compromise character" of the 1982 amendments does not detract from the validity of the majority views. Here the proponents of the compromise wording expressly agreed with the majority views and viewed the

<sup>28</sup> The cases cited by the Solicitor General in support of the effort to amplify the statements of individual senators and disparage the significance of the Senate Report, are inapposite.

In *North Haven Bd. of Education v. Bell*, 456 U.S. 512 (1982), the Court noted that "the statements of one legislator made during debate may not be controlling," but indicated that statements made by Senator Bayh, a sponsor of the legislation, were "the only authoritative indications of congressional intent regarding the scope of §§ 901 and 902" of Title IX, because §§ 901 and 902 originated as a floor amendment and no committee report discussed them. 456 U.S. at 526-27.

The other case cited by the Solicitor General, *Grove City College v. Bell*, — U.S. —, 104 S. Ct. 1211 (1984), also involved an interpretation of Title IX. The Court in *Grove City* again recognized that "statements by individual legislators should not be given controlling effect," but cited *North Haven* to support its position that "Sen. Bayh's remarks are 'an authoritative guide to the statute's construction.'" 104 S. Ct. at 1219. The Court indicated that Sen. Bayh's remarks were authoritative only to the extent that they were consistent with the language of the statute and the legislative history. *Id.*

Thus, *North Haven* and *Grove City* concern the significance of a sponsor's expressed views in the absence of a relevant statement in a committee report. Here, in marked contrast, the Solicitor General draws an unwarranted inference that electoral success might preclude a Section 2 claim from Senator Dole's expressed desire to avoid a requirement of proportional representation, and then asserts that inference as superior to an express statement to the contrary in the Senate Report.

compromise wording as merely a clarification of the intent of Congress.<sup>29</sup> In these circumstances, there is no reason to conclude that the Committee Report, prepared after adoption of the compromise, and accepted by all as an accurate explanation of it, loses its status as the most authoritative guide to legislative intent.

### III. THE DISTRICT COURT APPROPRIATELY LOOKED TO THE TOTALITY OF CIRCUMSTANCES INCLUDING THE EVIDENCE OF SOME BLACK ELECTORAL SUCCESS TO DETERMINE WHETHER BLACKS HAD EQUAL OPPORTUNITY TO PARTICIPATE IN THE ELECTORAL SYSTEM; THE COURT DID NOT REQUIRE PROPORTIONAL REPRESENTATION

At bottom, the argument of the Solicitor General and appellants, that limited electoral success by members of a minority group should be conclusive evidence that the group enjoys an equal opportunity to participate, rests on the claim that such a rule is implicit in the disclaimer that Section 2 does not provide a minority group the right to proportional representation. All parties agree that Section 2 was not intended by Congress to provide a right to proportional representation—but that point has no significance to the immediate issue.

As the pre-*Bolden* case law discussed previously illustrates, the trier of fact may find a denial of equal voting opportunity where, despite evidence of some minority group electoral success, evidence of other historical, social and political factors indicates such a denial. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968 (1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636. Such a finding in no way implies or necessitates that Section 2 be applied as a guarantee of proportional representation. The "disproportionality" of minority group representation is not the gravamen

<sup>29</sup> See text and notes accompanying nn.14-17, *supra*.

of the Section 2 claim in such a case, though it may be a factor; rather, it is the confluence of factors which indicates that an equal opportunity to participate in the political process and to elect representatives of their choice has been denied members of the group.<sup>30</sup>

In order to determine whether a violation of Section 2 has occurred, courts are to consider whether, given the "totality of circumstances," members of a protected class have been given an equal opportunity to participate in the electoral process and to elect representatives of their choice. In its opinion, the district court appeared to undertake just the sort of "totality of circumstances" analysis in the challenged state legislative districts as is required by Section 2. In fact, the district court, quoting the Senate Report at 28-29, set forth the nine so-called "Zimmer" factors which may be relevant in determining whether a Section 2 violation has been established, and proceeded to analyze those factors. 590 F. Supp. at 354.

The court stated that it found a high degree of racially polarized or bloc voting, such that in all districts a majority of the white voters never voted for any black candidate. The existence of racially polarized voting is a significant factor in determining whether vote dilution exists, particularly where, as here, large multimember districts are involved.<sup>31</sup> See *McMillan*

<sup>30</sup> As the Solicitor General himself points out, "[a]mended Section 2 . . . focuses not on guaranteeing election results, but instead on securing to every citizen the right to equal 'opportunity . . . to participate in the political process. . . .'" Brief for the United States as Amicus Curiae 14. Congress could not have been more clear in expressing its intention that election results alone should not be determinative of a Section 2 claim.

<sup>31</sup> We do not suggest that white voters should be forced to vote for minority candidates. Every voter, regardless of race has the right to vote for the candidate of his or her choice. If, however, a majority of white voters will not vote for a black candidate in any circumstance, and large multimember districts with majority white voting populations are drawn, the minority vote is likely to be of relatively little consequence. At best, minority voters are required to "single-shot" their votes to elect any black candidates in the face of the majority white opposition.

Because of idiosyncrasies that may be present in any particular election, the court should look at more than one election, as the district court did, to assess the pattern of racially polarized voting. Of course, for this reason, black success in a single election, even with some white support, cannot be determinative.

v. *Escambia County*, 748 F.2d 1037 (5th Cir. 1984); *United States v. Dallas County Commission*, 739 F.2d 1529 (11th Cir. 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 105 S. Ct. 375 (1984). This brief does not contend that all at-large, multimember districts should be suspect or subject to challenge under Section 2. Rather, the district court acknowledged that "a multimember district does not alone establish that vote dilution has resulted," 590 F. Supp. at 355, but found that large multimember districts along with severe racial polarization in voting and other factors combined here to create such dilution.<sup>32</sup>

The district court stated further that it found a history of official discrimination against blacks in voting matters—including the use of devices such as a poll tax, a literacy test, and an anti-single-shot voting law—which had continuing effect to depress black voter registration. 590 F. Supp. at 359-61. Although the district court acknowledged that these devices were no longer employed by the early 1970s, it also recognized that their existence for over half a century has had a lasting impact. *Id.* at 360. The lasting impact of historical discrimination on the present-day ability to participate in the electoral process has also been recognized in other recent cases. Cf. *United States v. Marengo County Comm'n*, 731 F.2d at 1567 ("[P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process."); *McMillan v. Escambia County*, 748 F.2d at 1043-44.

The district court decision rests, in part, on the fact that this history of official discrimination is still relatively close in terms of time. The court noted that a "good faith" effort is now being

<sup>32</sup> The Solicitor General mischaracterizes the district court's position in suggesting that it improperly defined racially polarized voting to exist where more than 50 percent of whites and blacks vote for a different candidate. The district court's finding of racially polarized voting instead was based on extensive expert testimony which established that a majority of white voters will not vote for any minority candidates. This was the case even when blacks ran for office unopposed.



made by the responsible state agency to remedy the effects of past discrimination. The court observed:

"... If continued on a sustained basis over a sufficient period, the effort might succeed in removing the disparity in registration which survives as a legacy of the long period of direct denial and chilling by the state of registration by black citizens. But at the present time the gap has not been closed, and there is of course no guarantee that the effort will be continued past the end of the present state administration." 590 F. Supp. at 361.

The court below also recognized as significant the majority vote requirement imposed by North Carolina in primaries. *Cf. Zimmer*, 485 F.2d at 1305. Because of the historical domination of the Democratic party in local races, this majority vote requirement in primaries substantially impeded minority voters from electing candidates of their choice. 590 F. Supp. at 363. Recent cases which have considered amended Section 2 have reached similar conclusions. *Cf. McMillan v. Escambia County*, *supra*, 748 F.2d at 1044 ("[A] majority vote is required during the primary in an area where the Democratic Party is dominant. This factor weighs in favor of a finding of dilution."); *United States v. Dallas County Commission*, *supra*, 739 F.2d at 1536 ("[T]he requirement of a majority in the primary plus the significance of the Democratic primary combined to 'weigh[] in favor of a finding of dilution....'"); *United States v. Marengo County Commission*, 731 F.2d at 1570 (A showing of vote dilution is "enhanced" by a majority vote requirement in the primary).

The district court found that "[f]rom the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns." 590 F. Supp. at 364.

Moreover, the racial appeals "have tended to be most overt and blatant in those periods when blacks were openly asserting political and civil rights." *Id.* The district court

concluded that the effect of racial appeals "is presently to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice." *Id.* Racial electoral appeals are a relevant factor. Senate Report at 29. While not present in this case, one must be sensitive to the possibility of racial electoral appeals by minority candidates as well.

And, the district court found that North Carolina had offered no legitimate policy justification for the form of the challenged districts. 590 F. Supp. at 373-74. As the court in *Marengo County* acknowledged, "the tenuousness of the justification for a state policy may indicate that the policy is unfair." 731 F.2d at 1571 (citation omitted).

The foregoing findings contained in the district court's opinion illustrate that in deciding this case the court appropriately considered the factors that Congress found relevant in assessing the "totality of circumstances." Amici also note that the district court analyzed black electoral success at length, as the statute contemplates, as "one circumstance to be considered." However, the Court found that in light of the totality of circumstances this evidence of electoral success was inadequate to establish that blacks had an equal opportunity to participate in the political process, because it was due to the presence of a variety of factors other than those which indicated that blacks had been given an equal opportunity to participate in the political process.

In the 1982 election in House District 36 (Mecklenburg County), for example, black candidate Berry was elected. 590 F. Supp. at 369. In that election, however, there were only 7 white candidates for 8 positions so that 1 black candidate had to be elected. *Id.* Even under these circumstances, only 42 percent of the white voters voted for Berry, the black candidate, in the general election, and Berry was the first black representative elected from House District 36 in this century. 590 F. Supp. at 365, 369. Seven other black candidates ran unsuccessfully for office between 1966 and 1981, and there was another black candidate in the 1982 election who lost. *Id.*



In Senate District 22, which also includes Mecklenburg County, only one black candidate has been elected, and he served from 1975-1980. 590 F. Supp. at 365. In 1980 and 1982, black candidates ran unsuccessfully, leaving an all-white four-member Senate delegation for this District. *Id.* In the 1980 and 1982 elections, not more than 33 percent of white voters voted for the black candidates, 590 F. Supp. at 369, while 78-94 percent of the black voters voted for the black candidates. *Id.* Even in the 1982 general election, where 94 percent of the black voters voted for the black candidate, the black candidate lost. *Id.* This illustrates the extreme difficulty blacks have in electing black candidates where there is racially polarized voting in a large, predominantly white multimember district.

Even in House District 23 (Durham County), which, on the surface, has a relatively successful rate of minority electoral success compared with some of the other challenged districts, factors other than equal access to the political process have contributed to that success. One black has been elected to the House each term since 1973. 590 F. Supp. at 366. In the 1978 general election and the 1980 primary and general elections, however, the black candidate ran uncontested. *Id.* at 370. Furthermore, in the 1982 primary there were only two white candidates for three seats so that one black necessarily had to win. *Id.* Nevertheless, more than half of the white voters failed to vote for the black candidates, even when they had no other choice. *Id.* at 370-71.<sup>33</sup>

In light of these findings, the district court found a denial of voting rights under its "totality of circumstances" analysis, despite some evidence of black electoral success. 590 F. Supp. at 376. The court observed that because of the racially polarized electorate, this electoral success came at a price. "[T]o have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." *Id.* at 369.

<sup>33</sup> See footnote 1 at p. 5, *supra*, for a brief outline of other minority electoral successes at issue here.

Furthermore, the court stressed that even this success was a recent phenomenon, and insofar as the 1982 elections were concerned, was "too 'haphazard' and aberrational in terms of specific candidates, issues, and political trends, and, in any event, still too minimal in numbers, to support any such ultimate inference" of equality of opportunity. *Id.* at 367 n.27.

The Solicitor General and appellants' position would narrow the scope of analysis in a fashion Section 2 does not permit. It would require the Court to ignore the totality of circumstances evidencing a denial of equal political and electoral opportunity in favor of focusing on only the most recent election returns. If those returns evidenced any noticeable success by minority candidates, that would be dispositive.

The Solicitor General and appellants try to justify this approach by arguing that the congressional rejection of a test of proportionality necessitates a finding that limited electoral success is dispositive of a Section 2 claim. The district court, in analyzing the "totality of circumstances," neither ignored electoral success by minorities, nor found this one factor to be conclusive. There is no suggestion in the opinion of the district court that it misinterpreted the intent of Congress and found a denial of voting rights simply because blacks had attained less than proportional success. Rather, the district court expressly acknowledged that the lack of proportional representation is insufficient to establish a Section 2 violation. 590 F. Supp. at 355.

## CONCLUSION

For the reasons set forth above, amici respectfully request that this Court affirm the decision below, and recognize the necessity of measuring a violation of Section 2 on the basis of the "totality of circumstances," with particular emphasis on the factors set forth in *Zimmer* and the Senate Report.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,  
Appellants,

v.

RALPH GINGLES, *et al.*,  
Appellees.

On Appeal from the United States District Court  
for the Eastern District of North Carolina

**BRIEF FOR THE LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW AND  
THE AMERICAN JEWISH COMMITTEE  
AS AMICI CURIAE SUPPORTING APPELLEES**

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**BRIEF FOR THE LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW AND  
THE AMERICAN JEWISH COMMITTEE  
AS AMICI CURIAE SUPPORTING APPELLEES**

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**STATEMENT OF INTEREST**

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to assure civil rights to all Americans. Protection of the equal voting rights of all citizens has been an important component of the Committee's work, and it has submitted *amicus curiae* briefs in a number of voting rights cases decided by this Court, including *Escambia County v. McMillan*, — U.S. —, 80 L.Ed. 2d 36 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has more than eighteen years' experience litigating voting rights cases, including several appearances before this Court.

The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of this organization that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and constitutional rights of all Americans, irrespective of race, religion, sex or national origin.

The American Jewish Committee and the Lawyers' Committee for Civil Rights Under Law strongly supported enactment of the Voting Rights Act of 1965. We continue to believe that this landmark statute, as amended, must be enforced vigorously to fulfill its objectives and therefore urge affirmance of the decision below.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal challenges a determination by a three-judge district court that a legislative redistricting plan enacted by the General Assembly of North Carolina had the effect of diluting black voting strength in six multi-member state House of Representatives and Senate districts and in one racially gerrymandered state Senate district.

Although this appeal presents this Court with its first plenary review of a case involving Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, since its amendment by Congress in 1982, the issues presented nonetheless fall within the well-developed jurisprudence of this Court concerning vote dilution. At stake in this litigation is the ability of the federal judiciary under the mandate of the Voting Rights Act to void discriminatory redistricting plans and to secure for black citizens the full opportunity to equally participate in the political process and to elect the representatives of their choice. Appellants, with the backing of the Solicitor General, seek to debilitate the amended Voting Rights Act by asserting that the trial court's careful examination of the context in which a vote dilution claim arises necessarily leads to a "proportional representation" standard of review. In addition, appellants would reinfuse an intent standard into the Act, despite its express repudiation by Congress in 1982, by requiring proof of the electorate's racial motivation before racial polarized voting may be weighed as an evidentiary factor in a vote dilution claim.

It is instructive that the attempt to secure such an evisceration of the amended Voting Rights Act occurs in the context of at-large elections. Beginning with *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Burns v. Richardson*, 384 U.S. 73 (1966), and continuing through *Rogers v. Lodge*, this Court has repeatedly viewed with skepticism the use of multimember districts in communities evidencing a history of sharp racial polarization and discriminatory practices. Although the use of at-large sys-

tems in itself violates neither the Voting Rights Act nor the Constitution, it is long settled that these systems singularly lend themselves to an impermissible diminution of the value of the franchise of minority populations. In amending the Voting Rights Act in 1982, Congress drew upon two challenges to at-large elections to frame the "totality of the circumstances" standard embodied in Section 2 of the Act. See *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

Under the statutory "totality of the circumstances" test derived from *White* and *Zimmer*, vote dilution claims are of necessity fact specific and must correspond to the local context. North Carolina is a state with a long history of official discrimination against blacks in all aspects of civil life, including the iron-clad preclusion of any role in political life. From the conclusion of Reconstruction until 1969, no black had ever been elected to the State House of Representatives; not until 1975 did any blacks number among the state's Senators. Against this background, the claims of "proportional representation" can be laid to rest with the most rudimentary examination of North Carolina political life. Although blacks constitute 22.4% of the state's population, between 1971 and 1982 (the year this lawsuit was filed), the number of blacks in the state House was between two and four out of a total of 120; between 1975 and 1983, there were one or two black members of the state Senate out of a total of 50. Only five House districts and two Senate districts are involved in this litigation and, as a simple arithmetical matter, the outcome would not and could not guarantee proportionality.

This appeal permits this Court to affirm the district court's proper application of the congressionally-specified evidentiary factors of illegal vote dilution. Beyond reaffirming the application of amended Section 2, however, this appeal allows for a renewed declaration of the piv-



otal role of the voting rights of America's minority citizens. If the political processes are to be utilized to eradicate the vestiges of discrimination from our society, full and equal participation in the political process, including the ability to elect representatives, must be guaranteed to minorities under the careful and exacting judicial scrutiny mandated by Congress.

As amici, the Lawyers' Committee for Civil Rights Under Law and the American Jewish Committee appeal to this Court not to waver from this task.

### ARGUMENT

#### I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE TOTALITY OF CIRCUMSTANCES DEMONSTRATED AN IMPERMISSIBLE DILUTION OF MINORITY VOTING STRENGTH, AND ITS ANALYSIS OF EACH OF THE RELEVANT FACTORS WAS CONSISTENT WITH THE VOTING RIGHTS ACT AMENDMENTS OF 1982.

##### A. Section 2 Violations Are Established By the "Totality of the Circumstances."

In 1982, Congress enacted a series of amendments to the Voting Rights Act, 42 U.S.C. § 1973, to secure for victims of discriminatory vote dilution a strong and workable statutory remedy. Congress devoted particular attention to the standards for proving abridgment of the right to vote under Section 2 of the amended Act as a result of this Court's ruling that claims of unconstitutional vote dilution can be premised only upon a showing of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).<sup>1</sup> The legislative history of the 1982 amendments makes unmistakably clear that the principal objective was to provide a remedy for electoral schemes that deny minorities an equal opportunity to participate in the political process and elect representatives of their

<sup>1</sup> The *City of Mobile* plurality extended the same standard to vote dilution claims under the pre-1982 version of Section 2. 446 U.S. at 61.

choice without requiring proof of discriminatory intent. S. Rep. No. 417, 97th Cong., 2d Sess. at 15-16, *reprinted* in 1982 U.S. Code Cong. & Ad. News 177 [hereinafter cited as S. Rep.].<sup>2</sup>

<sup>2</sup> The Solicitor General argues in his brief that the Senate Report "cannot be taken as determinative on all counts," and that the statements of Senator Dole must instead "be given particular weight." Brief for the United States as Amicus Curiae Supporting Appellants at 8 n.12, 24 n.49 [hereinafter cited as Br. for U.S.]. However, Senator Dole fully endorsed the Committee Report, as is clear from the first sentence of his Additional Views: "The Committee Report is an accurate statement of the intent of S. 1992, as reported by the Committee." S. Rep. at 193 (Additional Views of Senator Dole). See also S. Rep. at 199 (Supplemental Views of Senator Grassley, co-sponsor of Dole compromise amendment) ("I am wholly satisfied with the bill as reported by the Committee and I concur with the interpretation of this action in the Committee Report").

Contrary to the Solicitor General's contention, the Senate Report must be regarded as an authoritative pronouncement of legislative intent, since it was endorsed by the supporters of the original bill, as well as by the proponents of the compromise amendment. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1920). The Solicitor General's extensive reliance on the statements of witnesses before the Senate Committee on the Judiciary is unsupportable: "Remarks . . . made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight . . ." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976). See also *National Woodwork Mfrs. Assoc. v. N.L.R.B.*, 385 U.S. 612, 639-40 (1967); *N.L.R.B. v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); *United States v. Calamardo*, 354 U.S. 351, 357 n.9 (1957).

The Solicitor General's position is a radical departure from the previous reliance by the Justice Department on the Senate Report as the authoritative vehicle for interpreting Section 2. References to the Report are found throughout the government argument opposing the at-large election system in Dallas County, Alabama (Brief for Appellant at 20, 25, 26, 27, 35, 38, 41, *United States v. Dallas County Commission*, 739 F.2d 1529 (11th Cir. 1984), and are cited as authority in more than ten pages of its twenty-five page argument in *United States v. Marengo County Commission*, Brief for Appellant at 16, 18, 19, 20, 21, 22, 23, 25, 26, 27, 36, 39. *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 375 (1984).

The intent of Congress as revealed by the statutory language and the legislative history of the 1982 amendment to Section 2 makes five things clear.

First, in enacting a Section 2 results test, Congress intended to eliminate the necessity of demonstrating discriminatory intent to prove a violation. S. Rep. at 27; *McMillan v. Escambia County (McMillan II)*, 748 F.2d 1037, 1041-42 (5th Cir. 1984).

Second, the results test expressly "restore[d] the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote," S. Rep. at 27, which Congress understood not to require proof of discriminatory intent. This "results" test was a statutory codification of the test used by this Court in *White v. Regester*, S. Rep. at 27, and the pre-*City of Mobile* case law, most notably, *Zimmer v. McKeithen*. Accordingly, the pre-*City of Mobile* cases provide a guide as to how the statute is to be interpreted. S. Rep. at 27; see also *United States v. Marengo County Commission*, 731 F.2d 1546, 1565-66 (11th Cir. 1984), cert. denied, 105 S.Ct. 375 (1984).

Third, Congress intended that proof of a Section 2 violation should be "based on the totality of the circumstances." 42 U.S.C. § 1973(b). Under this standard, plaintiffs are held to a showing that the "political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766. The typical evidentiary factors which may be used to prove that minorities have less opportunity to participate in the political process are spelled out in the Senate Report.<sup>3</sup>

<sup>3</sup> The Senate Report specified the following constellation of factors:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the

Fourth, the evidentiary factors derived from these cases are relevant in any judicial inquiry into claims of vote dilution. However, the legislative history is clear that Congress intended that no one factor should predominate, and "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. at 29. Instead, Section 2 "requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of

members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provision, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Two additional factors of lesser evidentiary significance are mentioned:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. at 28-29 [footnotes omitted]



whether the voting strength of the minority voters is . . . 'minimized or canceled out.' " S. Rep. at 29 n.118, quoting *Fortson and Burns*.

Fifth, Congress intended Section 2 to reach practices that either completely negate or minimize the voting strength of minorities. The electoral successes of minority candidates is one of a number of circumstances "which may be considered." 42 U.S.C. 1973(b). Consequently, "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' in violation of this section." S. Rep. at 29 n.115, quoting *Zimmer*, 485 F.2d at 1307.

Of necessity, the question of the existence of vote dilution entails an intensely factual inquiry. The standard developed by the pre-*City of Mobile* case law and incorporated by Congress into the 1982 amendments provides a framework that highlights the features that have recurred through the various factual settings where vote dilution has been found. These factors correspond to a paradigmatic setting in which a claim of vote dilution incorporates some combination of the following: (1) structural obstacles to the electoral success of minorities, such as multimember districts, (2) a history of discrimination and/or absence of or minimal minority political success, and (3) certain behavioral patterns that accentuate the racial axis of the vote dilution, such as racially polarized voting and racial appeals in electoral campaigns. The juxtaposition of the particular factual pattern against the paradigm model of how an electoral system can operate to cancel out or dilute the exercise of the franchise by racial minorities yields the conclusion whether a violation of Section 2 of the Voting Rights Act exists.

**B. The District Court's Ultimate Conclusion of Discriminatory Results was Fully Supported by the Totality of Circumstances.**

Twenty years of voting rights litigation has imparted the clear lesson that certain electoral systems, foremost

among them multimember districts or at-large elections, have shown themselves to have resulted in the illegal dilution of minority voting strength with such regularity that, while not *per se* violative of the Voting Rights Act, these systems must elicit from reviewing courts a serious presumption of statutory infirmity under amended Section 2. In its last full treatment of a constitutional voting rights claim, this Court emphasized "the tendency of multi-member districts to minimize the voting strength of racial minorities." *Rogers v. Lodge*, 458 U.S. at 627. This Court has repeatedly ruled that at-large elections violate the statutory or constitutional rights of minority voters,<sup>4</sup> and has directed courts fashioning remedial decrees to avoid the implementation of such electoral systems.<sup>5</sup>

A wealth of social scientific literature confirms the "conventional hypothesis" that at-large elections constitute a significant political disadvantage for minority candidates and voters. See Davidson and Korbel, *At-Large Elections and Minority Group Representation*, 43 J. Politics 982, 994-95 (Table 1) (1981) (listing empirical studies).<sup>6</sup> Dissenting from the application of the constitutional intent standard in *Rogers v. Lodge*, Justice

<sup>4</sup> See *Rogers, supra*; *White, supra*; *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) (at-large elections described as method for whites to retain electoral control after black voter registration increase in wake of Voting Rights Act). In addition, sixteen of the 23 appellate court cases cited in the Senate Report involved challenges to at-large elections, of which ten were successful. S. Rep. at 23 n.78.

<sup>5</sup> *Connor v. Johnson*, 402 U.S. 690, 692 (1970) ("when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."); see also *Wallace v. House*, 425 U.S. 947 (1976); *East Carroll Parish Board v. Marshall*, 424 U.S. 636, 639 (1976); *Chapman v. Meier*, 420 U.S. 1, 18 (1975).

<sup>6</sup> See also E. Banfield & J. Wilson, *City Politics* 91-96, 303-308 (1963); A. Karnig & S. Welch, *Blk & Representation and Urban Policy* 99 (1980); Berry and Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla. St. U. L. Rev. 85, 93 (1979); Engstrom



Stevens focused on the inherent tendency of at-large systems to maximize majority political power and re-emphasized this Court's skeptical view of multimember districting. 458 U.S. at 632, 637-38 & n.16 (Stevens, J., dissenting) (quoting 1 J. Kent, *Commentaries on American Law* 230-31 (12th ed. 1873)).

The facts in this case present a clear example of the interaction between the at-large structural impediment and the history and behavioral patterns of discrimination in North Carolina.<sup>7</sup> The district court's findings of fact are replete with documentation of the discrimination against blacks in North Carolina, not only with respect to the right to vote, but also in housing, education, employment, health, and other public and private facilities. 590 F. Supp. at 359-64. The court noted past use of literacy tests, poll taxes, anti-single shot voting laws, numbered seat requirements, and other means to deny blacks the opportunity to register and vote, including the continued use of a majority vote requirement.

and McDonald, *The Election of Blacks to City Councils*, 75 Am. Pol. Sci. Rev. 344 (1981); Jones, *The Impact of Local Election Systems on Black Political Representation*, 11 Urb. Aff. Q. 345 (1976); Karnig, *Black Representation on City Councils*, 12 Urb. Aff. Q. 223-242 (1976); Kramer, *The Election of Blacks to City Councils*, 1971 J. of Black Studies 443-49 (1971); Latimer, *Black Political Representation in Southern Cities*, 15 Urb. Aff. Q. 65, 71-82 (1979); Robinson and Dye, *Reformism and Black Representation on City Councils*, 59 Soc. Sci. Q. 133-141 (1978); Sloan, "Good Government" and the Politics of Race, 17 Social Problems 161, 170-73 (1969).

In addition, studies have documented the impediments against black representation in southern legislatures created by at-large elections, and the amelioration of the discriminatory effects following the elimination of multimember districts. See, e.g., Parker, *Racial Gerrymandering and Legislative Reapportionment* in C. Davidson, *Minority Vote Dilution* 88 (1984).

<sup>7</sup> *Amici* emphasize that six of the seven challenged districts use at-large elections. The remaining district, Senate District No. 2, was created by extensive realignment and resulted in the division of a black population concentration, thereby precluding an effective voting majority. 590 F. Supp. at 358.

The court found that black voter registration rates remained depressed relative to whites "because of the long period of official state denial and chilling of black citizens' registration efforts." *Id.* at 361. Also as a consequence of the history of discrimination, blacks continue to suffer from a lower socioeconomic status which, the court found, continues to impair their ability to participate on an equal basis in the political process. *Id.* at 361-63. The historic use of racial appeals in political campaigns was found to persist in North Carolina, and to continue to affect the capability of blacks to elect candidates of their choice. *Id.* at 364. Finally, voting was found to be severely racially polarized in the challenged districts, *id.* at 367-72, and black candidates to remain at a disadvantage in terms of relative probability of success in running for office. *Id.* at 367.

In sum, with the single exception of denial of access to a candidate slating process, the district court found that all of the factors specified in the Senate Report existed or were present in the recent past in the challenged districts. More important, the persistent effect of each factor, even in isolation, was found to have a direct and appreciable impact on present minority political participation which continued to disadvantage blacks relative to whites. In light of these findings of fact, the district court properly concluded that the signposts for vote dilution drawn from the case law and legislative history of Section 2 all pointed to the dilution of minority voting strength in the multimember districts and the single-member Senate district.

## II. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE ELECTION OF SOME MINORITY CANDIDATES DID NOT ALTER THE HISTORIC PATTERN OF LACK OF OPPORTUNITY FOR MINORITY VOTERS, NOR DID IT ADOPT A PROPORTIONAL REPRESENTATION STANDARD.

Congress drew upon *White* and *Zimmer* as model judicial interventions to remove structural barriers that im-

peded minority access to the political process. It bears emphasis that many of the factors focused upon in *White* and its progeny are not in themselves either illegal or unconstitutional but may nonetheless, in their aggregate, trigger the need for remedial intervention.<sup>8</sup>

Appellants' arguments before this Court would defeat the overall inquiry into the structures, practices and behaviors affecting minority political opportunity in two critical ways: first, appellants would have the multifactored *White/Zimmer* analysis negated by the episodic election of black candidates, and second, appellants seek to introduce an intent standard into the well-developed concept of racially polarized voting.

**A. The Election of Some Black Officials Did Not Disprove Lack of Equal Opportunity to Elect Minority Officials.**

Appellants contend that "the degree of success at the polls enjoyed by black North Carolinians" distinguishes this suit from prior vote dilution cases and is sufficient "to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process." Br. of Appellants at 24. Similarly, the Solicitor General asserts that the challenged multimember districts have "apparently enhanced—not diluted—minority voting strength." Br. for U.S. at 23. Both Appellants and the Solicitor General cite the extent of claimed minority success as a principal reason for overturning the district court. This argument is wrong as a matter of law and fact.

As previously stated, the legislative history is clear that Congress intended that a Section 2 violation should

<sup>8</sup> "[T]he facts in *White* set the contours for the puzzle, but the blank spaces could be filled in with different pieces . . ." Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 699 (1982). See also Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va.L.Rev. 155 (1983).

depend upon "the totality of the circumstances," and the election of minority candidates in challenged districts does not, in itself, foreclose a finding of vote dilution. S. Rep. at 29 n.115. Thus, the degree of minority electoral success is "one circumstance which may be considered . . ." 42 U.S.C. 1973 (emphasis added). See also S. Rep. at 29 ("there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."). Indeed the proviso in Section 2<sup>9</sup> was enacted in response to concerns that a results test would devolve into a standard focused solely on the extent of minority electoral success.

The two principal cases cited by the Senate Report, *White* and *Zimmer*, both provide direct precedent for the district court's ruling that the election of minority candidates does not necessarily foreclose a finding of vote dilution. In *White*, this Court determined on facts almost identical to the present case that multimember legislative districts in Dallas and Bexar Counties, Texas, denied minority voters equal opportunities to elect candidates of their choice notwithstanding that two blacks and five Mexican-Americans had been elected to the Texas legislature from those districts. 412 U.S. at 766, 768-69. Similarly, in *Zimmer*, the Fifth Circuit found vote dilution in at-large, county-wide voting despite the election of three black candidates after the case was tried.<sup>10</sup>

<sup>9</sup> "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

<sup>10</sup> "[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority



Numerous pre-*City of Mobile* cases, which Congress intended to govern Section 2, establish the proper legal standard that, where other evidence of minority vote dilution is present, the election of minority candidates does not foreclose a finding of a voting rights violation.<sup>11</sup> Courts construing Section 2, as amended, have reached the same conclusion.<sup>12</sup>

The reasoning of these cases should be apparent. Under at-large voting, the election processes can easily be manipulated by the white voting majority to achieve any desired result, and the election of minority candidates alone is not determinative of whether minority voters enjoyed a genuine opportunity to elect candidates "of their choice." Under certain circumstances, notably the pendency of a challenge to at-large elections, the election

candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record." 485 F.2d at 1307.

<sup>11</sup> *Cross v. Baxter*, 604 F.2d 875, 885 (5th Cir. 1979) ("district court erroneously held that the election of a single black official foreclosed any possible dilution claims"); *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 (5th Cir. 1978); *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 149 n.21 (5th Cir. 1977), cert. den. 434 U.S. 877 (1977); *Graves v. Barnes (Graves II)*, 378 F. Supp. 640, 648, 659 (W.D. Tex. 1974), vac'd on other grounds sub nom. *White v. Regester (White II)*, 422 U.S. 935 (1975); *Wallace v. House*, 377 F. Supp. 1192, 1197 (W.D. La. 1974), aff'd in part and rev'd in part on other grounds, 515 F.2d 619 (5th Cir. 1975), vac'd on other grounds, 425 U.S. 947 (1976); *Beer v. United States*, 374 F. Supp. 363, 398 n.295 (D.D.C. 1974), vac'd on other grounds, 425 U.S. 130 (1976); *Yelverton v. Driggers*, 370 F. Supp. 612, 616 (S.D. Ala. 1974).

<sup>12</sup> See *Ketchum v. Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984), cert. denied, 86 L.Ed.2d 692 (1985); *Marengo County*, 731 F.2d at 1572; *NAACP v. Gadsden County School Bd.*, 691 F.2d 978 (11th Cir. 1982); *Sierra v. El Paso Ind. School Dist.*, 591 F. Supp. 802, 810 (W.D. Tex. 1984); *Major v. Treen*, 574 F. Supp. 325, 351 (E.D. La. 1983); *Political Civil Voters Organization v. Terrell*, 565 F. Supp. 338, 342 (N.D. Tex. 1983).

of hand-picked minority candidates might be "politically expedient" to the white majority or entrenched political forces. *Zimmer*, 485 F.2d at 1307. Similarly, such election of minority candidates might well be part of an effort to moot claims of minority vote dilution and to "thwart challenges to election schemes on dilution grounds." *Id.*

In rushing to herald the electoral success of North Carolina blacks, appellants and the Solicitor General overlook the critical findings of fact of the district court. The statewide figures reveal that there were never more than four blacks in North Carolina's 120-member House of Representatives between 1971 and 1982, and never more than two blacks in the 50-member State Senate from 1975 to 1983. 590 F. Supp. at 365. In the period from 1970 to 1982, black Democrats in general elections within the challenged districts lost at three times the rate of white Democrats. Tr. 114.

The district court's findings with respect to the 1982 elections showed that there were "enough obviously aberrational aspects in the most recent elections," 590 F. Supp. at 367, to disprove the contention that blacks were not still disadvantaged in the multi-member districts at issue. Although black Democratic candidates did enjoy some degree of success, it did not nearly rival the success of white Democratic candidates, not a single one of whom lost in the general elections. Tr. 114, 115. In House District 36, a black Democrat won one of the 8 seats in the district in 1982. Since there were only seven white candidates for the 8 seats in the primary, it was a mathematical certainty that a black would win. *Id.* at 369. In House District 23, there were only 2 white candidates for 3 seats in the 1982 primary, and the black candidate ran unopposed in the general election, but still received only 43% of the white vote. *Id.* at 370. In three other elections prior to 1982, the same black candidate won in unopposed races, yet failed to receive a majority of white votes in each contest. *Id.*



The district court made two critical findings of fact concerning the purported electoral successes of blacks in North Carolina. First, even in elections where black candidates were victorious, witnesses for the plaintiffs and defendants alike agreed that the victories were largely due to extensive single-shot voting by blacks.<sup>13</sup> Tr. 85, 181, 182, 184, 1099. Even the defendants' expert witness conceded that, "as a general rule," black voters had to single-shot vote in the multimember districts at issue in order to elect black candidates. Tr. 1437. Thus the district court determined, "[o]ne revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." 590 F. Supp. at 369.

Second, the district court also concluded that the evidence at trial showed that in several of the 1982 elections, "the pendency of this very litigation worked as a one-time advantage for black candidates in the form of unusual political support by white leaders concerned to forestall single-member districting." 590 F. Supp. at 367 n.27. This is exactly the concern which led the *Zimmer* court to reject assertions identical to those advanced by the appellants here.

In sum, the evidence amply supported the district court's conclusion that:

[T]he success that has been achieved by black candidates to date is, standing alone, too minimal in total

<sup>13</sup> Single-shot voting occurs when minority voters concentrate their voting strength on one or a few preferred candidates and deliberately fail to exercise their right to cast ballots for other candidates in the race. The purpose of single-shot voting is to enhance the likelihood of a minority candidate's election by depriving nonminority candidates of the minority vote; however, it also has the effect of completely eliminating any influence minority voters might have over the choice of the elected nonminority candidates. See *City of Rome v. U.S.*, 446 U.S. 156, 184 n.19 (1980).

numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367. In reviewing this issue, this Court should defer to the "intensely local appraisal of the design and impact of the . . . multimember districts," *White*, 412 U.S. at 670, which the three-judge district court gave the facts of this case. On this issue, appellants' contentions are wrong as a matter of law, and the district court's factual findings are supported by substantial evidence and are not clearly erroneous.<sup>14</sup>

**B. Appellants' Claim that the District Court Imposed a Proportional Representation Standard Harkens Back to the Rejected Arguments Made by Opponents of the 1982 Amendment to the Voting Rights Act.**

Without doubt the most inflammatory claim that can be raised in a vote dilution case is the charge of proportional representation. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 156-167 (1977). Appellants seek to obscure the district court's careful examination of all the *White/Zimmer* factors by raising the blazing charge that the district court "flatly" stated a standard of "guaranteed proportional representation." Br. for Appellants at 19. In appellants' eyes, any reference to the actual proportions of blacks in North Carolina as compared to black electoral success reveals the entire factual inquiry to have been a subterfuge designed to conceal an imposition of proportional representation. The district court opinion, however, expressly disavows any contention that a violation of Section 2 can be established by "the fact that blacks have not been elected under a challenged districting plan in numbers propor-

<sup>14</sup> See *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); Fed. Rule Civ. Pro. 52(a).

tional to their percentage of the population." 590 F. Supp. at 355.

Consideration of minority electoral success is one of many evidentiary factors which the case law and legislative history of the Voting Rights Act specify as proper grounds for judicial examination. The leap from the evidentiary weighing of the rate of success to an *ipso facto* creation of an entitlement to proportional representation is derived from the arguments made by opponents of the 1982 Amendments to the Voting Rights Act, namely that there is no intelligible distinction between a results test and proportional representation.<sup>15</sup> The argument that consideration of the rate of electoral success as one evidentiary factor inevitably yields proportional representation was firmly rejected both by the sponsors of the original amendment and the proponents of the Dole compromise. See, e.g., S. Rep. at 33 ("[T]he Section creates no right to proportional representation for any group"); *id.* at 194 (Additional Views of Senator Dole) ("I am confident that the 'results' test will not be construed to require proportional representation"). Since the district court properly considered the totality of circumstances under the mandated legal standards, the efforts to persuade this Court that it in fact required proportional representation can only be understood as an invitation to embrace the views of opponents of the 1982 amendments and should categorically be declined.

<sup>15</sup> See e.g., 1 *Voting Rights Act: Hearings on S. 53 et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 3 (1982) (Opening Statement of Senator Orrin Hatch) ("In short, what the 'results' test would do is to establish the concept of 'proportional representation' by race as the standard by which courts evaluate electoral and voting decisions"). A full discussion of the proportional representation objections of the legislation's opponents can be found in the Senate Subcommittee's Report. See S. Rep. at 139-147 (Voting Rights Act: Report of the Subcomm. on the Constitution); see also *id.* at 186-87 (Attachment B of Subcommittee Report: Selected Quotes on Section 2 and Proportional Representation).

### III. APPELLANTS SEEK TO NULLIFY THE 1982 AMENDMENT TO THE VOTING RIGHTS ACT BY FORECLOSING THE JUDICIAL INQUIRY INTO THE TOTALITY OF THE CIRCUMSTANCES WHICH GIVE RISE TO CLAIMS OF VOTE DILUTION.

#### A. The Use of Statistical Analysis and Lay Witnesses to Establish Racially Polarized Voting Without Any Inquiry Into Voter Motivation Is Fully Supported by the Case Law and the Legislative History of Section 2.

Appellants argue that the district court employed an erroneous legal standard in concluding that the facts of this case showed a high degree of racially polarized voting. They contend that the district court adopted a *per se* rule that racial bloc voting occurs whenever less than 50 percent of the white voters cast ballots for black candidates. Br. for Appellants at 36.<sup>16</sup>

Racially polarized voting is a key component of a vote dilution claim, as emphasized both by Congress and this Court. "In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections." S. Rep. at 33. As this Court wrote in *Rogers*,

Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.

458 U.S. at 623. Racially polarized voting, when proven, provides a court with a critical evidentiary piece show-

<sup>16</sup> The Solicitor General conceded in his brief in support of the Jurisdictional Statement that "[a]ppellants' restatement of the district court's standard for racial bloc voting is imprecise," since "the district court did not state that polarization exists unless white voters support black candidates in numbers at or exceeding 50%." Br. for the U.S. as *Amicus Curiae* at 13 n.10.



ing the political ostracism of a racial minority. *City of Rome v. United States*, 472 F. Supp. 221, 226 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). When combined with either at-large elections or a suspected gerrymander, bloc voting provides important confirmation that the potential structural impediments to minority political opportunity will in fact bar equal opportunity and the ability to elect representatives preferred by the minority community. See *Marengo County*, 731 F.2d at 1566-67 (racially polarized voting ordinarily the "keystone" of a dilution claim); *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

At bottom, racially polarized voting is that which "follow[s] racial lines . . ." *United Jewish Organizations*, 430 U.S. at 166 n.24. Courts construing the 1982 amendment to Section 2 have found racially-polarized voting when the facts show a consistent pattern of a majority of one race voting opposite to the majority of the other race. *McMillan II*, 748 F.2d at 1043. Whether or not a Section 2 violation has been proved depends upon the degree of racially polarized voting, i.e., "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. at 29 (emphasis added).

In the present case, based on evidence presented by expert witnesses and corroborated by the direct testimony of lay witnesses, the district court concluded that "within all the challenged districts racially polarized voting exists in a persistent and severe degree." 590 F. Supp. at 367. In direct reliance on the language of the Senate Report, the district court framed the inquiry in terms of "determin[ing] the extent to which blacks and whites vote differently from each other in relation to the race of the candidate." 590 F. Supp. at 367-68 n.29. The district court relied in part on testimony by plaintiffs' expert witness, Dr. Bernard Grofman, whose comprehensive study of racial voting patterns in 53 elections in the challenged

districts revealed consistently high correlations between the number of voters of a specific race and the number of votes for candidates of that race. These correlations were so high in each of the elections studied that the probability of occurrence by chance was less than one in 100,000. 590 F. Supp. at 368.

The district court analyzed elections in each of the challenged districts to conclude that, in each district, racial polarization "operates to minimize the voting strength of black voters." *Id.* at 372. This conclusion was buttressed by the observations of numerous lay witnesses involved in North Carolina electoral politics. The uncontroverted evidence showed that no black candidate received a majority of white votes cast in any of the 53 elections, including those which were essentially uncontested. *Id.* Whites consistently ranked black candidates at the bottom of the field of candidates, even where those candidates ranked at the top of black voters' preferences. *Id.* Given the overwhelming and uncontradicted facts of this case, there is no question but that racial polarization in each district was, as the district court properly found, "substantial or severe." 590 F. Supp. at 372.

Appellants challenge the methodology utilized by plaintiffs' expert witness as being "severely flawed." Br. for Appellants at 41. As the district court opinion makes clear, that methodology depended upon two distinct types of statistical analysis, ecological regression and homogeneous precinct analyses. These statistical studies were further corroborated by the lay testimony of direct participants in North Carolina politics. 590 F. Supp. at 367-68 n.29.

Appellants contentions run directly contrary to the preponderance of cases decided prior to *City of Mobile*, which Congress intended the courts to follow, as well as those applying Section 2 after its 1982 amendment. In the pre-*City of Mobile* cases, courts relied on statistical or



non-statistical evidence to establish racially polarized voting by a showing of a high degree of association between the racial composition of the voting precincts and the race of the candidate for whom votes were cast. See, e.g., *Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972) (three-judge court), *aff'd sub nom. White v. Regester* (polarized voting established by Mexican-Americans voting overwhelmingly for candidates of own national background and whites voting overwhelmingly for white candidates). In conformity with this approach, the ecological or bivariate regression analysis performed by Dr. Grofman compared the votes for minority candidates in different precincts with the racial composition of that precinct in both racially segregated and racially mixed precincts. As the district court observed, the result of such a comparison is considered *statistically* significant if the relationship between the variables is sufficiently consistent, and *substantively* significant if it is of a sufficient magnitude to affect the outcome of an election. 590 F. Supp. at 367-369. See *McMillan v. Escambia County* (*McMillan I*), 638 F.2d 1239, 1241-42 n.6 (5th Cir. 1981), *aff'd on rehearing*, 688 F.2d 960, 966 n.12 (5th Cir. 1982), *rev'd on other grounds*, *Escambia County v. McMillan*, — U.S. —, 80 L.Ed.2d 36 (1984); *McMillan II*, 748 F.2d at 1043 n.12 (affirming the definition of bloc voting and related findings made in *McMillan I*). The use of regression analysis to demonstrate the association between the racial composition of precincts and voting patterns is supported by both the pre-*City of Mobile* case law<sup>17</sup> and cases applying Section 2 after its 1982

<sup>17</sup> See *Parnell v. Rapides Parish School Board*, 425 F. Supp. 399, 405 (W.D. La. 1976), *aff'd*, 563 F.2d 180 (5th Cir. 1978), *cert. denied*, 438 U.S. 915 (1978) (regression analysis demonstrated high probability of polarization); *Bolden v. City of Mobile*, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd on other grounds*, 446 U.S. 55 (1980) (regression analysis supported finding of racial polarization). Accord H. Blalock, *Social Statistics*, ch. 17 (2d ed. 1979); Grofman, Migalski, Noviello, *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension*

amendment.<sup>18</sup>

The additional statistical study performed by Dr. Grofman, homogeneous precinct analysis (also known as "extreme case" analysis), is an accepted statistical method comparing the voting patterns in precincts with heavy concentrations of one race and other precincts with comparable concentrations of another race. See *City of Port Arthur v. United States*, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).<sup>19</sup>

In addition, ample precedent supports the district court's reliance on non-statistical evidence to supplement the testimony of experts.<sup>20</sup>

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*of the Voting Rights Act: A Social Science Perspective*, 7 Law and Policy 199 (1985).

<sup>18</sup> See *Jordan v. Winter*, 604 F. Supp. 807, 812-813 (N.D. Miss. 1984), *aff'd sub. nom. Mississippi Republican Executive Committee v. Brooks*, — U.S. —, 83 L.Ed.2d 343 (1984) (bivariate regression analysis indicated high level of racial polarization); *Marengo County*, 731 F.2d at 1567 n.35 (affirming district court's acceptance of regression analysis to show polarization); *Jones v. City of Lubbock*, 727 F.2d 364, 380 (5th Cir. 1984) (bivariate regression analysis provided strong basis for court's finding of polarization); *NAACP v. Gadsden County School Board*, 691 F.2d 978, 983 (11th Cir. 1982) (same regression technique used in *McMillan I* demonstrated polarization).

<sup>19</sup> See, e.g., *Terrell*, *supra*, 565 F. Supp. at 348; *Port Arthur*, *supra*, 517 F. Supp. at 1007 n.136. See also *Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir. 1982), *aff'd mem.* 459 U.S. 801 (1982); *Lipscomb v. Wise*, 399 F. Supp. 782, 785-786 (N.D. Tex. 1975), *rev'd on other grounds*, 551 F.2d 1043 (5th Cir. 1977), *rev'd*, 437 U.S. 535 (1978).

<sup>20</sup> See *Major v. Treen*, 574 F. Supp. 325, 338 (E.D.La. 1983) (testimony of trained political observers considered probative of bloc voting); *Terrell*, *supra*, 565 F. Supp. at 348; *Rome*, *supra*, 472 F. Supp. at 226-227 (finding testimony of black deponents highly probative of bloc voting); *Boykins v. Hattiesburg*, No. H77-0062(C), slip op. at 15 (S.D. Miss., March 2, 1984) ("lay witnesses from the White community . . . confirmed that members of the White community continue to oppose and fear the election of Blacks to office.")

**B. Appellants and the Solicitor General Seek to Reimpose an Intent Standard Onto Section 2 Claims by Requiring Proof of Motivation of Voters.**

Despite the district court's use of statistical and lay witness evidence "to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates," 590 F. Supp. at 367-68 n.29, appellants persist in charging that a *per se* rule was imposed. To the contrary, only *after* concluding that substantively significant racial polarization existed in all but two of the elections analyzed did the district court note that no black candidate had received a majority of the white votes cast. The court specifically referred to this finding as one of a number of "[a]dditional facts" which "support the ultimate finding that severe (substantively significant) racial polarization existed in the multi-member district elections considered as a whole." *Id.* at 368 (emphasis supplied).

The principal method for measurement of racial polarization relied on by the court below was the *statistically significant* correlation between the number of voters of a specific race and the number of votes for candidates of that race. 590 F. Supp. at 367, 368. The Solicitor General's charge that, under the lower court's methodology, a "minor degree of racial bloc voting would be sufficient to make out a violation," Br. for U.S. at 29, is gravely misleading since it confuses the lower court's definition of *substantive* significance with the court's initial definition of racial polarization as also requiring *statistical* significance. Contrary to the Solicitor General's conclusion that a "minor degree of racial bloc voting would be sufficient to make out a violation," Br. for U.S. at 29, a low correlation would result in a finding of a low extent of polarization and would weigh *against* an ultimate conclusion of impermissible vote dilution.<sup>21</sup>

<sup>21</sup> Thus, the hypothetical situation in which a white candidate receives 51% of the white vote and 49% of the black vote and an

Both the Solicitor General and appellants propose methods to discount the importance of racial bloc voting by requiring proof that racial motivation underlies the disparate voting patterns. Appellants would hold plaintiffs to a nightmarish standard of conclusively establishing the intent of the electorate by disproving possible motivation by "any other factor [besides race] that could have influenced the election." Br. for Appellants at 42. The Solicitor General similarly advocates a standard requiring plaintiffs to show that "'minority candidates . . . lose elections solely because of their race.'" Br. for U.S. at 31 (quoting *Rogers v. Lodge*). This standard, it is argued, would render racial bloc voting "largely irrelevant," *id.*; if a losing black candidate receives some unspecified amount of white support, this would demonstrate that motivational factors other than race play a role in the election.

Congress has made it plain that Section 2 plaintiffs are no longer required to ascribe nefarious motives to the individuals or community responsible for discriminatory election results; thus, it is immaterial whether white voters refuse to vote for black candidates "solely because of race" or because of some other factor closely associated with race. The impact of racial bloc voting on minority political participation is the same regardless of the ex-

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opposing black candidate gets the reverse would clearly not constitute severe polarization, as the Solicitor General contends. See Br. for U.S. at 29. In fact, since such a disparity would not be statistically significant, it would not constitute racial polarization at all. The suggestion that the district court's definition of racial polarization would invalidate numerous electoral schemes across the country, see *id.* at 30, conveniently ignores the fact that the court's correlation analysis correctly focused on "the extent to which voting . . . is racially polarized." S. Rep. at 29 (emphasis supplied). Racial polarization is properly evaluated as a question of degree, and not as a dichotomous characteristic which is legally conclusive if present and irrelevant in all other cases.



planation or motivation for that phenomenon.<sup>22</sup> In the presence of other *White/Zimmer* factors, if white voters consistently shun black candidates for reasons other than race, the result is still that the black community is effectively shut out of the political process.<sup>23</sup> In delineating the factors relevant to a showing of unequal opportunity to participate in the political process, Congress relied heavily on federal Courts of Appeals' interpretations of *White*, none of which adopted a definition of racial polarization that supports the standard urged here—in fact, most of them required no formal proof of polarization whatsoever.<sup>24</sup> Moreover, last Term, this Court rejected the argument that racial motivation of voters casting ballots for candidates of their own race must be established to prove racially polarized voting. *Mississippi Republican Executive Committee v. Brooks*, — U.S. —, 83 L.Ed.

<sup>22</sup> See Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 Howard L.J. No. 2 (1985) (forthcoming).

<sup>23</sup> This point is also responsive to appellants' objections to the statistical methodology relied upon by the district court, which was characterized by appellants' own expert witness as a standard methodology for measuring racial voting polarization. Tr. at 1445. It simply does not matter whether "race is the only explanation for the correspondence between variables." Appellants' Brief at 42. Where differential voting along racial lines exists, for whatever combination of reasons, the result in the context of structural impediments such as at-large or multimember district elections can be a dilution of the minority vote which renders minorities unable to elect representatives of their choice. This result is a violation of the Voting Rights Act regardless of the existence or nonexistence of proof of racial animus on the part of whites who fail to vote for blacks.

<sup>24</sup> See, e.g., *Ferguson v. Winn Parish Policy Jury*, 528 F.2d 592 (5th Cir. 1976); *Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974); *Moore v. Leflore County Bd. of Election Comm's*, 502 F.2d 621 (5th Cir. 1974); *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973). The original *Zimmer* factors themselves did not even include racially polarized voting. See *Zimmer*, 485 F.2d at 1305.

2d 343.<sup>25</sup> It should likewise reject the argument in this case.

#### IV. CLAIMS OF VOTE DILUTION, LIKE ALL CLAIMS OF AN ABRIDGMENT OF THE FRANCHISE, ARE ENTITLED TO SPECIAL JUDICIAL SOLICITUDE.

Based upon an exhaustive review of the totality of circumstances involved in the North Carolina legislative elections, the district court unanimously concluded, under the statutory results test, that the legislative redistricting abridged the voting rights of blacks. Of particular significance, the court detailed the continued taint of discrimination upon all walks of North Carolina's civil life. As the Voting Rights Act and other pieces of civil rights legislation make clear, the political processes may provide critical relief for the victims of past and continuing discrimination—providing that those channels are open to victimized minorities.

The Voting Rights Act sets out to remove structural barriers to minority access to political processes in order to facilitate the removal of the vestiges of discrimination. The Act corresponds to a heightened standard of judicial scrutiny set down by this Court nearly half a century ago:

[P]rejudice against discrete and insular minorities may be a special condition . . . curtailing the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry.

<sup>25</sup> Defendants, represented by the same counsel as at present, argued that, "The use of a regression analysis which correlates only racial make-up of the precinct with race of the candidate ignores the reality that race . . . may mask a host of other explanatory variables. [*Jones v. City of Lubbock*, 730 F.2d 233, 235 (5th Cir. 1984) (Higginbotham, J., concurring).]" Jurisdictional Statement, *Allain v. Brooks*, No. 83-2053, at 12-13. This Court summarily affirmed the district court's decision in that case and, therefore, "reject[ed] the specific challenges presented in the statement of jurisdiction," *Mandell v. Bradley*, 432 U.S. 173, 176 (1977).



*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Foremost among the rights specified by what Justice Powell has termed "the most celebrated footnote in constitutional law,"<sup>26</sup> is the right to vote. *Id.*, citing *Nixon v. Herndon*, 273 U.S. 536 (1927) and *Nixon v. Condon*, 286 U.S. 73 (1931). This Court has repeatedly stressed the need for judicial vigilance in claims of vote dilution or abridgment, as set forth in the *Carolene Products* footnote:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right to vote must be carefully considered and meticulously scrutinized.

*Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); see also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The right to vote is listed first in the *Carolene Products* footnote among those rights that may warrant "... more exacting judicial scrutiny . . .," since infringements on this right restrict "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . ." 304 U.S. at 152 n.4. Similarly, Congress has recognized that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . ." S. Rep. at 19 (citing *Reynolds*, 377 U.S. at 555 n.29). As this Court concluded in *White v. Regester*, where the totality of circumstances indicate that minority citizens have not been able to "enter into the political process in a reliable and meaningful manner," court remedies are indispensable to bring the minority community into "the full stream of

<sup>26</sup> Powell, J., *Carolene Products Revisited*, 82 Col. L. Rev. 1087 (1982).

political life . . ." 412 U.S. at 767, 769. In incorporating *White* and its progeny into the statutory results test, Congress repeatedly emphasized the importance of keeping political processes equally open to minorities:

Section 2 protects the right of minority voters to be free from election practices, procedures, or methods that deny them the same opportunity to participate in the political process as other citizens enjoy. . . .

The requirement that the political processes leading to nomination and election be 'equally open to participation by the group in question' extends beyond formal or official bars to registering and voting or maintaining a candidacy.

S. Rep. at 28, 30.

So long as the paths to political success remain closed, blacks remain the "discrete and insular" minorities of the *Carolene Products* footnote to whom a special measure of judicial solicitude is owed. See Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 733-37 (1985) (need for political success for minorities to transcend "pariah" role in political process). Conversely, "representation-reinforcing"<sup>27</sup> judicial intervention is the most efficacious manner by which this Court may insure that the goals of two decades of statutory civil rights litigation may one day be met.

<sup>27</sup> J. Ely, *Democracy and Distrust*, 101-103, 117 (1980). See also *id.* at 103:

Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

**CONCLUSION**

For the foregoing reasons, *amici* urge that the judgment of the district court be affirmed.

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IN THE  
**Supreme Court of the United States**

**October Term, 1985**

Lacy H. Thornburg, et al.,

*Appellants,*

vs.

Ralph Gingles, et al.,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF  
AMICI CURIAE IN SUPPORT OF APPELLEES OF  
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No. 83-1968  
IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LACY H. THORNBURG, ET AL.,

Appellants,  
versus

RALPH GINGLES, ET AL.,  
Appellees.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF OF AMICI  
CURIAE IN SUPPORT OF APPELLEES OF  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, INC.; LEAGUE OF WOMEN  
VOTERS OF THE UNITED STATES; AND,  
LEAGUE OF WOMEN VOTERS EDUCATION FUND

Come now the above listed  
organizations, by counsel, and move the  
Court for leave to file a brief amici  
curiae in support of the Appellees in

-x-

the above styled cause.<sup>1</sup>

The American Civil Liberties Union  
Foundation, Inc. (ACLU) is a non-profit,  
nationwide, membership organization  
whose purpose is the defense of the  
fundamental rights of the people of the  
United States. A particular concern of  
the ACLU is the enforcement of the  
Fourteenth and Fifteenth Amendments, and  
implementing legislation enacted by  
Congress, in the area of minority voting  
rights. Attorneys associated with the  
ACLU have been involved in numerous  
voting rights cases on behalf of racial  
minorities, including, most recently in  
this Court, Hunter v. Underwood,

       U.S.       , 105 S. Ct. 1916 (1985);

<sup>1</sup>Counsel for the Appellants have not  
given consent to the filing of this  
brief.



McCain v. Lybrand, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 1037 (1984); and Rogers v. Lodge, 458 U.S. 613 (1982).

The League of Women Voters of the United States (LWVUS, or League) is a national, nonpartisan, nonprofit membership organization with 110,000 members in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. The LWVUS's purpose is to promote political responsibility through informed and active participation of citizens in government. The LWVUS believes voting is a fundamental right that must be fostered and protected. With its network, the LWVUS was a major participant in the effort to strengthen and extend the Voting Rights Act in 1982. Leagues and the LWVUS have been active in voting rights litigation.

The League of Women Voters

Education Fund (LWVEF), an affiliate of the LWVUS, is a nonpartisan, nonprofit education organization, one of whose purposes is to increase public understanding of major public policy issues. The LWVEF provides a variety of services, including research, publications, monitoring and litigation on current issues, such as voting rights and election administration. The LWVEF's docket includes Jones v. City of Lubbock, 730 F.2d 233, 727 F.2d 364 (5th Cir. 1984), in which a local League member was a named plaintiff.

This case presents important issues involving the application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and whether the statute protects equal, or as argued by Appellants and the United States, merely token minority access to the political

process. Because of the experience of amici in advocating minority voting rights, and because the parties may not adequately present the Section 2 issues discussed in this brief, amici believe their views may be of some benefit to the Court in resolving the issues raised in this appeal.

Respectfully submitted,

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No. 83-1968

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LACY H. THORNBURG, ET AL.,  
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BRIEF OF AMICI CURIAE IN SUPPORT OF  
APPELLEES OF AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION, INC.; LEAGUE OF WOMEN  
VOTERS OF THE UNITED STATES; AND,  
LEAGUE OF WOMEN VOTERS EDUCATION FUND

INTEREST OF AMICI CURIAE

The interests of amici curiae are  
set forth in the motion for leave to  
file this brief, supra, p. x.

### STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief of Appellees.

### SUMMARY OF ARGUMENT

In 1982 Congress amended Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, to make clear its purpose of prohibiting voting procedures that result in discrimination. The construction urged upon this Court by the Appellants and the Solicitor General -- that the election of a token number of minorities to office in the disputed districts of North Carolina's 1982 legislative reapportionment forecloses a challenge under Section 2 -- is totally inconsistent with Congress's purposes in

amending Section 2.

The language and the legislative history of Section 2 expressly show that there is no validity to the argument that minimal success by minority candidates can be equated with fair and effective participation of minorities in the political process. Section 2 is designed to protect the right to equal, not token or minimal, participation. The extent to which minorities have been elected is only one of the factors to be considered by a court in evaluating a Section 2 claim.

Congress has articulated a policy that favors strong enforcement of civil rights. Such a policy clearly does not embrace tokenism or minimalism in voting. If the Appellants and the Solicitor General prevail in their argument, there will be no incentive for



jurisdictions to comply voluntarily with the Voting Rights Act, but instead they will be encouraged to resist and to circumvent Section 2.

The district court applied correct legal standards and methods of analysis in finding racial bloc voting. The imposition of any rigid definitions or methodologies for proving bloc voting would be inconsistent with the purposes of Section 2, would unduly burden minority plaintiffs and in some cases would make it impossible to challenge discriminatory voting practices.

The judgment below should be affirmed on the grounds that the trial court properly applied Section 2.

## ARGUMENT

### I. THE ELECTION OF A TOKEN NUMBER OF MINORITY CANDIDATES DOES NOT FORECLOSE A SECTION 2 CHALLENGE.

#### A. The Statute and the Legislative History

Both the Appellants and the Solicitor General, as counsel for amicus curiae the United States, argue that the election of a token number of minorities to office in the disputed districts of North Carolina's 1982 legislative reapportionment absolutely forecloses Appellees' challenge to the diluting effect of at-large voting and multi-member districting under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. See Appellants' Brief, p. 24: "The degree of success at the polls

enjoyed by black North Carolinians is sufficient in itself to distinguish this case from White [v. Regester], 412 U.S. 755 (1973) and Mobile [v. Bolden], 446 U.S. 55 (1980) ] and to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process." (emphasis supplied); Brief for the United States as Amicus Curiae, p. 27: "multimember districts are not unlawful where, as here, minority candidates are not effectively shut out of the electoral process."<sup>1</sup>

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<sup>1</sup>The Solicitor General, underscoring the extremity of this position, noted that "[t]he closest analogy to this case is Dove v. Moore, supra, in which the court of appeals upheld the validity of an at-large system under which the 40% black minority elected one member to an eight-member city council." (emphasis supplied). Id., at 27-8.

The argument that minimal success by minority candidates absolutely forecloses a Section 2 challenge is refuted by the language of the statute itself.<sup>2</sup> First, the statute requires

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<sup>2</sup>Section 2 provides in full:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members

[Footnote continued]

that political processes be "equally open" to minorities, and that they not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The right protected by the statute, therefore, is one of equal, not token or minimal, political participation.

Second, the statute directs the trial court to consider "the totality of circumstances" in evaluating a violation, and provides that "[t]he

---

of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." Obviously, if black electoral success is merely one of the "totality" of circumstances which may be considered by a court in evaluating a Section 2 claim, a finding of minimal or any other level of success could not be dispositive. The statute on its face contemplates that other circumstances may and should be considered.

The legislative history of Section 2 makes the point explicitly. It provides that factors in addition to the election of minorities to office should be considered, and that minority candidate success does not foreclose the possibility of dilution of the minority vote. See Senate Rep. No. 97-417, 97th



Cong., 2d Sess. 29 n.115 (1982)  
(hereinafter "Senate Rep.").

In 1982, Congress amended Section 2 to provide that any voting law or practice is unlawful if it "results" in discrimination on account of race, color or membership in a language minority. 96 Stat. at 134, §3, amending 42 U.S.C. § 1973. Prior to amendment, the statute provided simply that no voting law or practice "shall be imposed or applied...to deny or abridge the right...to vote on account of race or color" or membership in a language minority.<sup>3</sup> A plurality of this Court,

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<sup>3</sup>The statute provided in its entirety: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section [Footnote continued]

however, in City of Mobile v. Bolden, 446 U.S. 55, 60-1 (1980), held that "the language of §2 no more than elaborates upon that of the Fifteenth Amendment," which it found to require purposeful discrimination for a violation, and that "the sparse legislative history of §2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."

Congress responded directly to City of Mobile by amending the Voting Rights Act. The House, by a vote of 389 to 24, passed an amendment to Section 2 on October 5, 1981. 127 Cong. Rec. H7011 (daily ed., Oct. 5, 1981). The House bill, H.R. 3112, provided (the language in brackets was deleted and the language in italics was added):

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1973b(f)(2) of this Title."

Section 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

As the Report of the House Committee on the Judiciary explained, the purpose of the amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision," and "to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the

challenged practice." House Rep. No. 97-227, 97th Cong., 1st Sess. 29 (1981) (hereinafter "House Rep.").

In the Senate, the Subcommittee on the Constitution, chaired by Senator Orrin Hatch, rejected the Section 2 amendment and reported out a ten year extension of Section 5 and the other temporary provisions of the Act by a vote of 3 to 2. Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 67 (1982). The Senate Judiciary Committee, however, pursuant to the so-called "Dole Compromise," authored by Sen. Robert Dole, returned the results standard to Section 2 and added subsection (b), taking language directly from White v. Regester, 412 U.S. 755, 766 (1973). The purpose of the addition was to clarify

that the amended statute "is meant to restore the pre-Mobile legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote," and "embodies the test laid down by the Supreme Court in White." Senate Rep. at 27. The Senate bill also provided, as did the House bill, that amended Section 2 did not guarantee the right to proportional representation. Id., at 30-1.

The Senate disclaimer was designed to meet criticism, particularly by Senator Hatch, that the language of the House bill would permit a violation of the statute merely upon a showing of lack of a proportional number of minorities in office and "an additional scintilla of evidence." Voting Rights Act: Hearings Before the Subcomm. on the

Constitution of the Senate Comm. of the Judiciary, Vol. 1, 97th Cong., 2d Sess. 516 (1982) (hereinafter "Senate Hearings"). The compromise language was intended to clarify (if indeed clarification was needed) that a court was obligated to look at the totality of relevant circumstances and that, as in "this White line of cases," minority office holding was "one circumstance which may be considered." 2 Senate Hearings at 60 (remarks by Senator Dole). The compromise language, however, was not intended to alter in any way the House bill's totality of circumstances formulation based upon White. That is made clear by the Senate Report which provides that the Committee's substitute language was "faithful to the basic intent of the Section 2 amendment adopted by the



House," and was designed simply "to spell out more specifically in the statute the standard that the proposed amendment is intended to codify." Senate Rep. at 27.

The Senate passed the Senate Judiciary Committee's Section 2 bill without change on June 18, 1982. 128 Cong. Rec. S7139 (daily ed., June 18, 1982).<sup>4</sup> The Senate bill (S. 1992) was returned to the House where it was incorporated into the House bill (H.R. 3112) as a substitute, and was passed unanimously. 128 Cong. Rec. H3839-46 (daily ed., June 23, 1982).

Both the House and Senate Reports

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<sup>4</sup>Prior to passage the Senate defeated by a vote of 81 to 16 a proposed amendment deleting the "results" language from the bill introduced by Senator John East. 128 Cong. Rec. S6956, S6965 (daily ed., June 17, 1982).

give detailed guidelines on the implementation of Section 2 and congressional intent in amending the statute. According to the Senate Report, plaintiffs can establish a violation by showing "a variety of factors [taken from White, Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub. nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), and other pre-Bolden voting cases], depending upon the kind of rule, practice, or procedure called into question." Senate Rep. at 28. Typical factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.  
Id., at 28-9.

The factors set out in the Senate Report were not deemed to be exclusive, but illustrative: "while these

enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." Id. In addition, Congress made it plain that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. Instead, Section 2 "requires the court's overall judgment based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is... 'minimized or cancelled out.'" Id., at 29 n.118.

The House Report is to the same effect: "the court should look to the context of the challenged standard, practice or procedure," and consider "[a]n aggregate of objective factors" taken from pre-Mobile decisions, similar

to those set out in the Senate Report. House Rep. at 30. And like the Senate Report, the House Report provides that "[a]ll of these factors need not be proved to establish a Section 2 violation." Id.

Not only does the legislative history provide that no one factor is dispositive in vote dilution cases, and that the courts should consider the totality of relevant circumstances, but the argument of the State and the Solicitor General that minimal or token minority candidate success forecloses a statutory challenge was considered and expressly rejected. While the extent to which minorities have been elected to office is a significant and relevant factor in vote dilution cases, the Senate Report indicates that it is not conclusive.

The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section. Zimmer 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a 'safe' minority candidate. 'Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution...Instead we shall continue to require an independent consideration of the record.' Ibid.

Id., at 29 n.115<sup>5</sup>

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<sup>5</sup>The Solicitor General attempts to discount the Senate Report on this point by arguing that the report "cannot be taken as determinative on all counts." Brief for the United States as Amicus Curiae, p. 24 n.49. Of course, this Court has "repeatedly stated that the authoritative source for finding the legislature's intent lies in the Committee reports on the bill." Zuber v. Allen, 396 U.S. 168, 186 (1969). Accord, Garcia v. United States,

[Footnote continued]



In Zimmer, relied upon in the Senate Report, three black candidates won at-large elections in East Carroll Parish after the case was tried. The county argued, as the State and Solicitor General do here, that these successes "dictated a finding that the at-large scheme did not in fact dilute the black vote." 485 F.2d at 1307. The Fifth Circuit disagreed:

we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the

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U.S., 105 S. Ct. 479, 483 (1984). In any case, there is simply nothing in the legislative history to indicate that there was any disagreement with the proposition that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this Section." Senate Rep. at 29, n. 115.

work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations - namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district.  
Id.

Similarly, in White v. Regester, the case principally relied upon by Congress as embodying the "results" standard it incorporated into Section 2, and whose language Congress expressly adopted, two blacks and five Mexican-Americans had been elected to the Texas Legislature from Dallas and Bexar Counties. 412 U.S. at 766, 768-69. Despite that level of minority candidate success, which is greater than that in

some of the districts claimed by the State and the Solicitor General to be immune from a Section 2 challenge here, e.g. House Districts 8 and 36, and Senate Districts 2 and 22, this Court in a unanimous decision held at-large elections impermissibly diluted minority voting strength in those counties.

In addition to White and Zimmer, the Congress, in amending Section 2, relied upon some 23 courts of appeals decisions which had applied a results or effect test prior to City of Mobile. Senate Rep. at 32, 194; 128 Cong. Rec. S6930 (daily ed. June 17, 1982) (remarks of Sen. DeConcini):<sup>6</sup> One of those 23

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<sup>6</sup>The 23 cases are listed and discussed in 1 Senate Hearings at 1216-26 (appendix to prepared statement of Frank R. Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law).

cases, Kirksey v. Board of Supervisors, 554 F.2d 139, 149 n.21 (5th Cir. 1977), commented upon the continuing validity of the Zimmer rule that the election of a minimal number of blacks did not foreclose a dilution claim: "we add the caveat that the election of black candidates does not automatically mean that black voting strength is not minimized or cancelled out." Accord, Cross v. Baxter, 604 F.2d 875, 880 n.7, 885 (5th Cir. 1979).

Cases decided since the amendment of Section 2 have predictably applied the statute in light of the legislative history and rejected the contention that minimal or token black success at the polls forecloses a dilution claim. See, United States v. Marengo County Commission, 731 F.2d 1546, 1571-72 (11th Cir. 1984) ("it is equally clear that

the election of one or a small number of minority elected officials will not compel a finding of no dilution"), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 375 (1984); Velasquez v. City of Abilene, 725 F.2d 1017, 1023 (5th Cir. 1984) ("In the Senate Report...it was specifically noted that the mere election of a few minority candidates was not sufficient to bar a finding of voting dilution under the results test."); Major v. Treen, 574 F. Supp. 325, 339 (E.D. La. 1983); Rybicki v. State Board of Elections, 574 F. Supp. 1147, 1151 and n.5 (E.D. Ill. (1983)).

The necessity of considering factors other than the election of minorities to office is particularly apparent in House District 21 (Wake County) and House District 23 (Durham County), districts in which blacks,

according to the Solicitor General, have enjoyed "proportional representation." Brief for the United States as Amicus Curiae Supporting Appellants, p.25. While one black has been elected to the three member delegation from House District 23 since 1973, and a black has been elected in 1980 and 1982 to the six member delegation from House District 21, the district court found this success was the result of single shot voting by blacks, a process which requires minorities to give up the right to vote for a full slate of candidates. According to the lower court, "[o]ne revealed consequence of this disadvantage [of a significant segment of the white voters not voting for any black candidate] is that to have a chance of success in electing candidates of their choice in these



districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." Gingles, 590 F. Supp. at 369. Under the circumstances, the election of blacks in these districts can not mask the fact that the multi-member system treats minorities unfairly and dilutes their voting strength.

Black voters in House District 23 must forfeit up to two-thirds of their voting strength and black voters in House District 21 must forfeit up to five-sixths of their voting strength to elect a candidate of their choice to office. Whites, by contrast, can vote for a full slate of candidates without forfeiting any of their voting strength and elect candidates of their choice to

office. Such a system clearly does not provide black voters equal access nor the equal opportunity to participate in the political process and elect candidates of their choice to office. That is another reason why the mere election of even a proportional number of blacks to office does not, and should not, foreclose a dilution challenge. As Section 2 and the legislative history provide, a court must view the totality of relevant circumstances to determine whether the voting strength of minorities is in fact minimized or abridged in violation of the statute.

To summarize, the position of the State and the Solicitor General that the election of a token or any other number of blacks to office bars a dilution challenge must be rejected because it is contrary to the express language of

Section 2, the legislative history and the pre-Mobile line of cases whose standards Congress incorporated into the "results" test.

B. Congressional Policy Favors Strong Enforcement of Civil Rights Laws

Congress enacted the Voting Rights Act of 1965 as an "uncommon exercise of congressional power" designed to combat the "unremitting and ingenious defiance of the Constitution" by some jurisdictions in denying minority voting rights. South Carolina v. Katzenbach, 383 U.S. 301, 309, 334 (1966). Based upon the continuing need for voting rights protection, Congress extended and expanded the coverage of the Act three

times - in 1970, 1975 and 1982.<sup>7</sup> It would be illogical to suppose, that in amending Section 2, Congress suddenly retreated from its general commitment to racial equality in voting and adopted a statute providing only tokenism and minimal political participation. That is certainly not what the Congress thought it was doing. As the Senate Report provides, the purpose of the 1982

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<sup>7</sup>Voting Rights Act Amendments of 1970, 84 Stat. 314 (extending Section 5 coverage and the other special provisions of the Act for five more years; adding jurisdictions for special coverage; establishing a five year nationwide ban on literacy tests); Act of August 6, 1975, 89 Stat. 402 (extending Section 5 and the other special provisions for seven additional years; making permanent the nationwide ban on literacy tests; extending Section 5 to language minorities and requiring bilingual registration and elections in certain jurisdictions); Voting Rights Act Amendments of 1982, 96 Stat. 131 (extending Section 5 for twenty-five years and amending Section 2).

legislation was to "extend the essential protections of the historic Voting Rights Act...[and] insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future." Senate Rep. at 4.

Modern congressional civil rights enforcement policy in other areas has similarly not been one of minimalism. Congress, for example, clearly intended to protect more than token access to public accommodations when it enacted Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et. seq.. See, H.R. Rep. No. 914, 88th Cong., 2d Sess. (1963), reprinted in [1964] 2 U.S. Code Cong. & Ad. News 2393 ("It is...necessary for the Congress to enact legislation which prohibits and provides

the means to terminating the most serious types of discrimination.") Congress also sought to protect more than token access to employment opportunities and jury service when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., and the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et. seq. H.R. Rep. No. 914, supra, U.S. Code Cong. & Ad. News at 2401 ("the purpose of this title is to eliminate...discrimination in employment based on race, color, religion, or national origin."); H.R. Rep. No. 1076, 90th Cong., 2d Sess. (1968), reprinted in [1968] 2 U.S. Code Cong. & Ad. News 1793 (a major purpose of the Federal Jury Act is to establish "an effective bulwark against impermissible forms of discrimination and arbitrariness in jury



selection.")

Section 2 does not guarantee proportional representation any more than Title II guarantees proportional occupancy of places of public accommodation, or Title VII guarantees proportionality in hiring, or the Federal Jury Act guarantees juries that proportionately represent minorities. See, e.g., United States v. Jenkins, 496 F.2d 57, 65 (2d Cir. 1974) ("The Act was not intended to require precise proportional representation of minority groups on grand or petit jury panels.") But certainly Title II could not be rationally construed to bar a challenge to an otherwise discriminatory public accommodations policy merely because any given number of rooms were let to blacks, nor could Title VII be construed to bar an otherwise valid

employment discrimination claim merely because a token number of minorities had been hired, nor could the Federal Jury Act be deemed to bar a challenge to a discriminatory jury selection system merely because a few blacks were allowed into the jury pool. Such a reading of congressional civil rights laws would be illogical and totally contrary to the intent of Congress in legislating against discrimination. Yet, that is the untenable position of the State and the Solicitor General in this case.

If the State and the Solicitor General prevail in their argument, it will be impossible to eradicate discriminatory election procedures in places where minority candidates have had some success. In addition, those jurisdictions in which black candidates have had no success will be encouraged,

as Congress found, to manipulate the election of a "safe" or token minority candidate to give the appearance of racial fairness and thwart successful dilution challenges to discriminatory election schemes. As a result, there will be no incentive for voluntary compliance with Section 2, and every inducement for circumvention and continued litigation. Future progress in minority voting rights will be dealt a severe setback.

II. THE DISTRICT COURT PROPERLY FOUND  
RACIAL BLOC VOTING.

A. The Court Applied Correct  
Standards

The State and the Solicitor General argue that the district court applied a

legally incorrect definition of bloc voting which vitiates its conclusions that the challenged districts dilute minority voting strength.<sup>8</sup> According to the State, the lower court applied the test that "polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate." Appellants' Brief, p. 36. According to the Solicitor General, the court adopted a definition that polarized voting occurs "whenever 'the results of the individual election would have been different depending upon whether it had been held among only the white voters or the black voters in the

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<sup>8</sup>The State concedes that Appellees' calculations were basically accurate, and that the methods of analysis used "were standard in the literature." 590 F. Supp. at 368.

election.'" Brief for the United States as Amicus Curiae, p. 29.

While it is true, as the trial court noted, that in none of the elections did a black candidate receive a majority of white votes cast, 590 F. Supp. at 368, and that in all but two of the elections the results would have been different depending upon whether they had been held among only the white or only the black voters, id., the court did not base its finding of bloc voting merely upon these facts. The district court examined extensive statistical evidence of 53 sets of election returns involving black candidacies in all the challenged districts, heard expert and lay testimony and concluded that:

On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates

either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested.  
Id.

The court also found that the polarization was statistically significant in every election in that the probability of it occurring by chance was less than one in 100,000.  
Id.<sup>9</sup> Taking the opinion as a whole, it

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<sup>9</sup>The court determined "statistical significance" by examining the  
[Footnote continued]



is clear that the district court did not adopt or apply a narrow, simplistic or legally incorrect definition of polarized voting.<sup>10</sup>

The State also contends that racial bloc voting in the challenged districts is irrelevant where a black won an election. Appellants' Brief, pp. 39-40: "Racially polarized voting is

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correlations between the race of voters and candidates prepared by Appellees' expert. While "correlations above an absolute value of .5 are relatively rare and correlations above .9 extremely rare...[a]ll correlations found by Dr. Grofman in the elections studied had absolute values between .7 and .98, with most above .9. This revealed statistical significance at the .00001 level - probability of chance as explanation for the coincidence of voter's and candidate's race less than one in 100,000." 590 F. Supp. at 368 n.30.

<sup>10</sup>Both the State and the Solicitor General have opinions about when bloc voting is relevant, but neither, it should be noted, attempted to define racial bloc voting.

significant...when the black candidate does not receive enough white support to win the election...The mere presence of different voting patterns in the white and black electorate does not prove anything one way or the other about vote dilution." Given this analysis, 100% voting along racial lines would be irrelevant in a challenge to multi-member district elections if blacks were able to single-shot a black into office. Congress indicated in the statute and the legislative history, however, that the totality of relevant circumstances should be considered. One of the relevant circumstances, regardless of other factors that may be present, is bloc voting.

B. The Court's Methodolgy  
Was Acceptable

In finding racial bloc voting, the court below relied upon two methods of statistical analysis employed by Appellees' expert: extreme case analysis and bivariate ecological regression analysis.<sup>11</sup> Both methods are "standard in the literature," as the lower court found, 590 F. Supp. at 367 n.29, and both have been extensively used by the courts in voting cases in establishing the presence or absence of racial bloc

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<sup>11</sup>Extreme case analysis compares the race of voters and candidates in racially homogeneous precincts. Regression analysis uses data from all precincts and corrects for the fact that voters in homogeneous and non-homogeneous precincts may vote differently. 590 F. Supp. at 367 n.29.

voting.<sup>12</sup>

In Lodge v. Buxton, Civ. No. 176-55 (S.D. Ga. Oct. 26, 1978), slip op. at 7-8, the trial court found racial bloc voting in Burke County, Georgia, based upon simple extreme case analysis in two elections in which blacks were candidates, a third election in which a white sympathetic to black political

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<sup>12</sup>Not all cases finding vote dilution, however, have made findings of bloc voting. Neither White v. Regester, supra, nor Zimmer v. McKeithen, supra, the cases principally relied upon by Congress in establishing the results standard of Section 2, made specific findings that voting was racially polarized. The legislative history of Section 2 makes bloc voting a relevant factor but does not indicate that it is a requirement for a violation. See, e.g., United States v. Marengo County Commission, 731 F.2d 1546, 1566 (11th Cir. 1984), citing the Senate Report and concluding that "[w]e therefore do not hold that a dilution claim cannot be made out in the absence of racially polarized voting."

interests was a candidate and a fourth election in which a black had won a city council seat in a district with a high percentage of black voters. The court's analysis and discussion of bloc voting is set out in Appendix A to this brief. This Court affirmed the finding of bloc voting in Burke County and the conclusion that the at-large elections were unconstitutional. Rogers v. Lodge, 458 U.S. 613, 623 (1982) ("there was also overwhelming evidence of bloc voting along racial lines").

For other cases approving the use of extreme case or regression analysis to prove bloc voting, see City of Petersburg v. United States, 354 F. Supp. 1021, 1026 n.10 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973); Bolden v. City of Mobile, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976) ("Regression analysis

is a professionally accepted method of analyzing data."), aff'd, 571 F.2d 238 (5th Cir. 1978), rev'd on other grounds, 446 U.S. 55 (1980); Nevett v. Sides, 571 F.2d 209, 223 n.18 (5th Cir. 1978) ("bloc voting may be demonstrated by more direct means as well, such as statistical analyses, e.g. Bolden v. City of Mobile"); NAACP v. Gadsden County School Board, 691 F.2d 978, 982-3 (11th Cir. 1982) (finding "compelling" evidence of racial bloc voting based upon bivariate analysis); United States v. Marengo County Commission, 731 F.2d 1546, 1567 n.34 (11th Cir. 1984); McMillan v. Escambia County, 748 F.2d 1037, 1043 n.12 (5th Cir. 1984) (confirming the use of regression analysis comparing race of voters and candidates to prove bloc voting); Jones v. City of Lubbock, 727 F.2d 364, 380-81



(5th Cir. 1984) (approving the use of bivariate regression analysis).

The State contends, however, that bivariate regression analysis is "severely flawed" and that the presence of racial bloc voting can only be established by use of a multivariate analysis that tests or regresses for factors other than race, such as age, religion, income, education, party affiliation, campaign expenditures, or "any other factor that could have influenced the election." Appellants' Brief, pp. 41-2.<sup>13</sup> The State relies

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<sup>13</sup>The Solicitor General does not support the Appellants on this point, but agrees with the Appellees that "[i]n most vote dilution cases, a plaintiff can establish a prima facie case of racial bloc voting by using a statistical analysis of voting patterns that compares the race of a candidate with the race of the voters." Brief for the United States as Amicus Curiae, p. 30 n.57.

principally upon the concurring opinion of Judge Higginbotham in Jones v. City of Lubbock, 730 F.2d 233, 234 (5th Cir. 1984), denying rehearing to 727 F.2d 364 (5th Cir. 1984), in which he says in dicta that proof of a high correlation between race of voters and candidates may not prove bloc voting in every case and that it "will often be essential" to eliminate all other variables that might explain voting behavior.

Not only has this Court expressly approved findings of bloc voting based upon extreme case and regression analysis, but it has rejected the contention that multivariate regression analysis is required. In Jordan v. Winter, Civ. No. GC-80-WK-0 (N.D. Miss. April 16, 1984), slip op. at 11, the three judge court invalidated

under Section 2 the structure of Mississippi's second congressional district in part upon a finding of a "high degree of racially polarized voting" based upon a bivariate regression analysis comparing the race of candidates and voters in the 1982 elections. The State appealed, Allain v. Brooks, No. 83-2053, and challenged the finding of bloc voting, citing Judge Higginbotham's concurring opinion in Lubbock (id., Jurisdictional Statement at 12-3).<sup>14</sup>

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<sup>14</sup>See also, Justice Stevens concurring opinion in Mississippi Republican Executive Committee v. Brooks, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 416 n.1 (1985), noting that the Jurisdictional Statement in No. 83-2053 "presents the question whether the District Court erroneously found...that there has been racially polarized voting in Mississippi."

The use of a regression analysis which correlates only racial make-up of the precinct with race of the candidate 'ignores the reality that race...may mask a host of other explanatory variables.' [730 F.2d] at 235.

This Court summarily affirmed, sub nom. Mississippi Republican Executive Committee v. Brooks, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 416 (1984), thereby rejecting the specific challenge to the sufficiency of bivariate regression analysis to prove racial bloc voting contained in the jurisdictional statement. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

It should be reemphasized that Judge Higginbotham ruled for the plaintiffs in Lubbock and concurred in the judgment affirming the dilution finding by the district court. He concluded that the defendants, other

than criticizing the plaintiffs' methodology, failed to offer any statistical evidence of their own in rebuttal, and that accordingly plaintiffs must be deemed to have established bloc voting:

given that there is no evidence to rebut plaintiffs' proof other than the city's criticism of Dr. Brischetto's study and its attempt to show responsiveness, I agree with Judge Randall that the record is not so barren as to render clearly erroneous the finding by the district court that bloc voting was established.  
730 F.2d at 236.

Thus, the most that can be argued from Judge Higginbotham's concurrence is that where plaintiffs prove bloc voting by correlation analysis, the proof must stand unless defendants rebut plaintiffs' evidence with statistics of their own. The State made no such rebuttal here.

In United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984), the district court found evidence of bloc voting based upon the correlation of race of candidates with voting, 739 F.2d at 1535 n.4, but discounted it because of supposedly non-racial factors, e.g. voter apathy, the advantage of incumbency, blacks ran as "fringe party" candidates, etc. 739 F.2d at 1536. The court of appeals rejected these non-racial explanations for the defeat of black candidates because of lack of support in the record. Id. The case thus approves the proposition that it is sufficient to establish racial bloc voting by bivariate analysis, and if such a finding is to be discounted, there must be contradicting evidence in the record. The State produced no



contradicting evidence in this case and as a result its argument that bloc voting was not proved should be unavailing.

C. The Court Should Not Adopt a Rigid Definition or Method of Proof of Bloc Voting

Aside from requiring polarization to be significant, this Court should not adopt any additional definition of racial bloc voting. Section 2 analysis requires a court to evaluate the particular, unique facts of individual cases. Imposing any rigid definition of bloc voting in advance would thus be inconsistent with the totality of circumstances and individual appraisal approach to dilution claims which

Congress has adopted. It might also lead to findings of bloc voting or no bloc voting in individual cases which, in view of the totality of factors, would be simply arbitrary.

This Court has avoided a single formula approach to proof of polarization or discrimination in other areas of civil rights law. In jury discrimination cases, for example, this Court and lower federal courts have used a number of tests for establishing a prima facie showing of minority exclusion but have never indicated that one method of statistical analysis is required in every instance.

In Swain v. Alabama, 380 U.S. 202 (1965), the Court indicated that a disparity as great as 10% between blacks in the population and blacks summoned for jury duty would not prove a prima

facie case of unconstitutional underrepresentation. Swain was generally applied to mean that disparities in excess of 10% would be unconstitutional. Foster v. Sparks, 506 F.2d 805, 811-37 (5th Cir. 1975) (Appendix to the Opinion of Judge Gewin). The so-called "absolute deficiency" method of analysis used in Swain does not give a true picture of underrepresentation, however, when the minority group is small. For example, if the excluded group were 20% of the population and 10% of those summoned for jury duty, the absolute deficiency would only be 10%, whereas in fact the group would be underrepresented by one-half.

To meet the limitations of the absolute deficiency standard, this Court and lower federal courts have also used a comparative deficiency test for

measuring underrepresentation, by which the absolute disparity is divided by the proportion of the population comprising the specified category. Alexander v. Louisiana, 405 U.S. 625, 629-30 (1972) (using both the absolute and comparative deficiency methods); Berry v. Cooper, 577 F.2d 322, 326 n.11 (5th Cir. 1978); Stephens v. Cox, 449 F.2d 657 (4th Cir. 1971). Those courts using the comparative deficiency standard have not, however, adopted any particular cut off for racial exclusion.

This Court has also referred to, without requiring that it be used, a third method of calculating underrepresentation in jury selection, the statistical significance test. Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977); Alexander v. Louisiana, supra, 405 U.S. at 630 n.9, 632. The

test measures representativeness by calculating the probability of a disparity occurring by chance in a random drawing from the population. The district court in this case used this method of analysis in part to support its finding of bloc voting.

It is apparent from examining the cases that this Court has not required a single mathematical formula or standard for measuring underrepresentation in all jury selection cases and has, in fact, expressly declined to do so. Alexander v. Louisiana, supra, 405 U.S. at 630. A similar approach to proof of bloc voting in vote dilution cases would therefore be consistent with this Court's treatment of related discrimination issues in other cases.

It is significant that none of the tests for jury exclusion used by this

Court has required challengers to disprove non-racial factors as the explanation for minority underrepresentation. Instead, once a prima facie case has been made using some form of bivariate analysis, the courts have held that the burden of proving selection procedures are racially neutral shifts to election officials. Alexander v. Louisiana, supra, 405 U.S. at 632; Casteneda v. Partida, supra, 430 U.S. at 497-98. In the context of vote dilution litigation, defendants might attempt to disprove bloc voting by any method of analysis they chose, including multivariate regression analysis, but that should be no part of plaintiffs' case.

It would be plainly inconsistent with the intent of Congress to require plaintiffs to conduct multivariate



analysis in Section 2 cases. In amending Section 2 Congress adopted the pre-Mobile dilution standards, and bivariate correlation analysis was an accepted method of proving bloc voting. Therefore, this method of proof should be satisfactory under Section 2.

Requiring plaintiffs to conduct multivariate regression analysis would also shift a court's inquiry from the result or fact of voting along racial lines to the intent of voters, an inquiry which Congress intended to pretermitt in amending Section 2. Congress adopted the results standard for three basic reasons. First, the Bolden intent test "asks the wrong question." Senate Rep. No. 97-417 at 36. If minorities are denied a fair opportunity to participate in politics, existing procedures should be changed

regardless of the reasons the procedures were established or are being maintained. Second, the intent test is "unnecessarily divisive" because it requires plaintiffs to prove the existence of racism. Id. Third, "the intent test will be an inordinately difficult burden for plaintiffs in most cases." Id.

It would be tantamount to the repeal of the 1982 law to say that proof of intent is not required in Section 2 cases, and at the same time make plaintiffs prove that voters were voting purposefully for reasons of race to establish a violation. Such an evidentiary burden would again ask the "wrong question," would be unnecessarily divisive and would place inordinately difficult burdens on minority plaintiffs. It would essentially

nullify the intent of Congress in enacting the statute.

There are a number of very practical considerations, not discussed by the State at all, which further demonstrate the inherent unfairness, and in some cases the impossibility, of requiring minority plaintiffs to conduct multivariate regression analysis.

(1) Impossibility. In some cases it will simply be impossible to do any kind of regression analysis, or even an extreme case analysis, i.e., where there is only one or no homogenous precincts. Requiring a multivariate regression analysis in a city with only one polling place, such as Moultrie, Georgia, see Cross v. Baxter, 604 F.2d 875, 880 n.8 (5th Cir. 1979), would absolutely foreclose a dilution challenge, even through minorities were

totally shut out of the political process and polarization was complete.<sup>15</sup> Such a result would be absurd and contrary to the intent of Congress in amending Section 2.

In still other cases, regression or even extreme case analysis will be impossible to perform because election records no longer exist or cannot be broken down into precincts. Such was the situation in Rome, Georgia, where the trial court nonetheless found bloc voting and denied Section 5 preclearance to a number of municipal voting

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<sup>15</sup>In Cross, the court of appeals held simply that a finding by the trial court of no bloc voting "on this record" would be clearly erroneous where "[n]o black candidate has ever received even a plurality of white votes and Wilson, the first black elected to the council appears to have received as little as 5% of white votes." Id.

changes. City of Rome, Georgia v. United States, 472 F. Supp. 221, 226 n.36 (D.C. 1979). This Court affirmed, concluding that the district court did not err in determining "that racial bloc voting existed in Rome." City of Rome v. United States, 446 U.S. 156, 183 (1980).

(2) Quantification. The State ignores the enormous burden, and in some instances the impossibility, of quantifying, i.e. expressing in numbers, all the non-racial factors potentially influencing voters. It would be difficult indeed to quantify candidate expenditures or name recognition, or as the State suggests, "any other factor that could have influenced the election," by precinct. Appellants' Brief, pp. 41-2. Perhaps these factors could be quantified through extensive

surveys; perhaps not. But in any case, the attempt to quantify them would be enormously difficult, time consuming and expensive and in most cases the burden on minority plaintiffs would be prohibitive.

The State's suggestion that plaintiffs quantify and regress "any other factor" that might have influenced the elections would send plaintiffs on a wild goose chase. Even if it were possible, both financially and literally, for plaintiffs to provide a multivariate analysis, defendants would claim - as the State has here - that allegedly relevant factors were omitted and that the analysis thus must fail. The State's argument is little more than a prescription for maintenance of discriminatory election practices.

(3) Unavailable Precinct Level



Data. The State fails to note that correlation analysis is almost always based upon precinct level data. While racial data is usually available, precinct level data for income, education, etc., generally does not exist. The Census contains some of this information by enumeration districts, or in some states by block data, but not by precincts. The cost and time involved in extracting non-racial variables from the Census at the precinct level, to the extent that they are available at all, would be overwhelming if not prohibitive.

The State's contention that Appellees must conduct a multivariate analysis is contrary to Section 2, the legislative history and the prior decisions of this Court. The finding of bloc voting and the methodology of the

lower court in this case were entirely correct.

#### CONCLUSION

Amici Curiae respectfully urge the Court to affirm the judgment below on the grounds that the trial court properly applied amended Section 2 to find that North Carolina's 1982 legislative apportionment impermissibly dilutes minority voting strength.

Respectfully submitted,

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**APPENDIX A**  
Trial Court's Analysis of Bloc Voting  
in Lodge v. Buxton, Civ. No. 176-55  
(S.D. Ga. Oct. 26, 1978), slip. op. at

7-9

There was a clear evidence of bloc voting the only time Blacks ran for County Commissioner. Obviously, this must be ascribed in part to past discrimination. There are three Militia Districts in which Blacks are in a clear majority, the 66th, 72d and 74th.<sup>7</sup> In a

<sup>7</sup>The Court finds the following to be a reasonably accurate estimate of the registered voters by race in each district, as of 1978.

<u>Precinct</u>	<u>Black</u>	<u>White</u>	<u>Total</u>
Waynesboro 60-62 District	1,050	2,149	3,199
Munnerlyn 61st District	44	50	94

[Footnote continued]  
A-1

fourth district, the 69th, as of 1978, there were only a few more Blacks than Whites. One black candidate, Mr.

Alexander 63rd District	75	104	179
Sardis 64th District	211	478	689
Keysville 65th District	163	214	377
Shell Bluff 66th District	167	82	249
Greenscatt 67th District	49	215	264
Girard 68th District	110	195	305
St. Clair 69th District	29	26	55
Vidette 71st District	52	112	164
Gough 72d District	201	68	269
Midville 73rd District	184	195	379
Scotts Store 74th District	98	52	150
Total	2,433	3,940	6,373

A-2

Childers, won in the four black districts, losing in all of the others. The other black candidate, Mr. Reynolds, won in three of the black districts losing in all of the others.<sup>8</sup>

Similarly, in 1970 Dr. John Palmer, a white physician from Waynesboro, who open the first integrated waiting room in Burke County, ran for County Commission. Generally, he was thought of as being sympathetic to black political interests. He was soundly defeated.

In the recent city council election in Waynesboro, the county seat, a Black was elected to the council for the first time in history. This event can be

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<sup>8</sup>Plaintiffs' Request for Admissions, filed June 5, 1970, Exhibits I-3 and I-4.

attributed to the high degree of bloc voting, and to the fact that the elected Black ran in a district with a high percentage of black residents.<sup>9</sup>

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<sup>9</sup>This was possible because this Court created single-member districts. See Sullivan v. DeLoach, Civil No. 176-238 (S.D. Ga.) Order entered September 11, 1977.



MOTION 1985  
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No. 83-1968

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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LACY H. THORNBURG, *et al.*,  
*Appellants*,

v.

RALPH GINGLES, *et al.*,  
*Appellees*.

---

On Appeal from the United States District Court for  
the Eastern District of North Carolina

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF FOR COMMON CAUSE AS AMICUS CURIAE**

---

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 83-1968

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LACY H. THORNBURG, *et al.*,  
v. *Appellants,*  
RALPH GINGLES, *et al.*,  
*Appellees.*

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On Appeal from the United States District Court for  
the Eastern District of North Carolina

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MOTION FOR LEAVE TO FILE BRIEF FOR  
COMMON CAUSE AS AMICUS CURIAE

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Pursuant to Rule 42 of the Rules of this Court, Common Cause hereby moves this Court for leave to file a brief as *amicus curiae* in this case. Counsel for Appellees has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for Appellants was requested but refused.

As set forth in the attached brief at 1-2, Common Cause has a strong interest in the disposition of this ap-

peal and believes that its perspective differs from that of any party. This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

Respectfully submitted,

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August 30, 1985

IN THE  
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OCTOBER TERM, 1985

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**BRIEF FOR COMMON CAUSE AS AMICUS CURIAE**

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**INTEREST OF THE AMICUS  
AND SUMMARY OF ARGUMENT**

Common Cause is a nonpartisan organization with 250,000 members, a central purpose of which is to further responsible and honest government, accountable in practice as well as in theory to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It believes that this case involves extraordinary stakes both for minority voters, who have historically been denied an equal opportunity to participate in that process, and for



democratic institutions generally, which can be truly democratic only if all citizens have equal electoral opportunity. Therefore, Common Cause submits this brief as *amicus curiae* urging affirmance of the decision below.

Common Cause seeks to provide the Court with a perspective on this litigation that differs from that of any party. In the interest of ensuring more reasoned and predictable identification of violations of Section 2 of the Voting Rights Act, it attempts herein to develop a framework that will aid the Court in appreciating the interrelationships between and the significance of the factors identified in the Senate Report on the 1982 amendment to that Act.

Section 2 embodies Congress' determination to compensate for the diminishment of the voting strength of racial minorities caused by prior intentional discrimination. To that end, it prohibits not merely electoral schemes that bar racial minorities from the political process, but also plans that dilute the group voting strength of a minority. Such dilution occurs whenever an electoral system denies a racial minority an opportunity, proportionate to its share of the population, to elect representatives of its choice. Electoral success can be achieved in two different ways, and it is these two avenues for influencing electoral outcomes to which the Senate Report factors are addressed.

The first avenue is a racial group's exercise of its direct voting strength—its ability, which increases with its share of the population, to influence electoral outcomes regardless of the votes of other groups. An important gauge of impairment of a minority's direct voting strength is whether concentrations of minority voters have been manipulated to dilute the impact of their votes. Such manipulation can take the form of "fracturing" or "packing" in the context of single-member districts, or can result from subsuming concentrations of minority voters into multimember districts.

The second avenue to electoral success is coalition-building: A racial group that lacks a majority in an electoral district may combine its strength with that of other groups to form coalitions capable of electing candidates of the groups' mutual choice. Impairment of a racial group's ability to engage in coalition politics can be discerned most clearly from the presence of racial bloc voting. Other indicia can include race-based electoral appeals, socioeconomic deprivation in the minority community, and underrepresentation of minority-backed candidates in elected positions. The less direct voting strength a minority has, the more successful it must be in aligning itself with other voting blocs to influence elections.

The showing required of a plaintiff under Section 2 should relate to the ultimate issue whether the challenged practice, considered in context, impairs a racial group's ability to pursue these alternative avenues to electoral success. In the case of single-member districts, dilution of the minority's direct voting strength through fracturing or packing normally should violate Section 2 where racial bloc voting or other factors indicate that the minority's ability to engage in coalition politics also is impaired.

Multimember districts inherently dilute a minority's direct voting strength—an effect that is greatest where such a district subsumes a minority concentration sufficient to be a majority in a single-member district. This dilutive effect warrants close scrutiny to ensure that the ability of minorities to build coalitions is not also diminished. In such a situation, any more than *de minimis* racial bloc voting normally should be sufficient to trigger a Section 2 violation.

Under these standards, the findings below amply justify the trial court's conclusion that the practices challenged here violate Section 2.

## ARGUMENT

### I. THE 1982 AMENDMENT TO THE VOTING RIGHTS ACT EXPRESSED CONGRESS' INTENT TO REMEDY DILUTION OF RACIAL MINORITY VOTING STRENGTH CAUSED BY THE CONTINUING EFFECTS OF PAST DISCRIMINATION.

When Congress in the 1982 Voting Rights Act Extension ("the 1982 Act") extended the effectiveness of Section 2 of the Voting Rights Act,<sup>1</sup> it also changed that section. Congress rejected the implications of the Court's plurality opinion in *City of Mobile v. Bolden*,<sup>2</sup> which Congress viewed as radically altering the constitutional standard for vote dilution cases on which Section 2 originally had been premised.<sup>3</sup> The Senate Report accompanying the 1982 Act explains that, prior to *Bolden*, the Court had held that proof of discriminatory intent was not necessary in a vote dilution case.<sup>4</sup> The plurality in *Bolden* had overruled that position, concluding that the Constitution forbids only intentional dilution of a racial minority's voting power.<sup>5</sup> In response, Congress amended Section 2 to provide that a violation of the Act is established

"if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial minority] . . . in that its members have less opportunity than other members of the electorate

<sup>1</sup> Pub. L. 97-205 § 3, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973(b) (1982)), amending Pub. L. 89-110, 79 Stat. 437 (1965).

<sup>2</sup> 446 U.S. 55 (1980).

<sup>3</sup> S. Rep. No. 417, 97th Cong., 2d Sess. 19 (1982).

<sup>4</sup> *Id.* at 24-25.

<sup>5</sup> *Id.* at 24. The plurality further found that Section 2 of the Voting Rights Act was coextensive with the Constitution in this respect. *City of Mobile v. Bolden*, 446 U.S. at 60-61.

to participate in the political process and to elect representatives of their choice."<sup>6</sup>

Congress thus removed any doubt that Section 2 is intended to prohibit discriminatory results as well as discriminatory intent.<sup>7</sup>

Congress viewed this amendment as essential to achieving its primary goal, which was to compensate for the diminishing effect of prior purposeful discrimination on the voting strength of racial minorities.<sup>8</sup> Because "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination,"<sup>9</sup> Congress found it necessary to go beyond prohibiting intentional discrimination in order best to redress the continuing effect of prior wrongs. Section 2 as amended seeks to eradicate any vestiges of prior discrimination still reflected in current electoral structures. Therefore, a plaintiff seeking to establish a violation does

<sup>6</sup> 42 U.S.C. § 1973(b) (1982). Congress further prescribed that: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

<sup>7</sup> "Plaintiffs must either prove such [discriminatory] intent, or alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. Rep. No. 417, *supra* note 3, at 27; *see also id.* at 2, 10, 40; H.R. Rep. No. 227, 97th Cong., 1st Sess. 2, 31 (1982).

<sup>8</sup> *See Jones v. City of Lubbock*, 727 F.2d 364, 374-75 (5th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325, 343 (E.D. La. 1983). Indeed, the Senate Report explains that this remedial goal also was the prime motivation behind the original passage of the Voting Rights Act of 1965. S. Rep. No. 417, *supra* note 3, at 5 (quoting statement of Sen. Jacob Javits, 111 Cong. Rec. 8295 (1965)).

<sup>9</sup> S. Rep. No. 417, *supra* note 3, at 40; *see* H.R. Rep. No. 227, *supra* note 7, at 31. Congress also noted the difficulty of proving intentional discrimination. H.R. Rep. No. 227, *supra* at 31; S. Rep. No. 417, *supra* at 10, 40.

not have to show that the adoption of the challenged practice itself caused the dilution of voting strength.<sup>10</sup> The practice is unlawful if it contributes to the perpetuation of that dilution.

The legislative history indicates that Congress wished to incorporate into the statute the pre-*Bolden* caselaw to guide courts in identifying Section 2 violations.<sup>11</sup> That caselaw had applied a "totality of circumstances" test that took into account a number of factors relevant to the nature of the challenged practice and the context in which it operated.<sup>12</sup> The legislative history makes clear, however, that there is "no requirement that any particular number of factors be proved, or that a majority of them point one way or the other,"<sup>13</sup> and recognizes that certain factors may be more relevant than others in

<sup>10</sup> See generally Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 Yale L.J. 189, 200-01 (1984).

<sup>11</sup> See S. Rep. No. 417, *supra* note 3, at 32; see also *id.* at 15; H.R. Rep. No. 227, *supra* note 7, at 29-30.

<sup>12</sup> As an interpretive aid, the Senate Report enumerates a number of typical objective factors, largely identified in *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd. on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), to guide courts in analyzing the discriminatory nature of an election system. Those factors include: a history of official discrimination against minority voters; the presence of racial polarization or racial appeals in elections; exclusion of the minority from any candidate slating process; creation of unusually large election districts; adoption of majority vote requirements, anti-singleshot provisions, or other similar restrictions; socioeconomic deprivation in the minority community resulting from past discrimination; and underrepresentation of the minority among elected officials. In addition, the Report notes that a lack of responsiveness by elected officials to the needs of the minority or reliance on a tenuous policy to justify the State's use of the challenged practice may have some probative value. S. Rep. No. 417, *supra* note 3, at 28-29.

<sup>13</sup> *Id.* at 29.

a particular context.<sup>14</sup> In addition, "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution."<sup>15</sup>

## II. SECTION TWO'S ASSURANCE OF EQUAL "OPPORTUNITY" FOR RACIAL MINORITIES TO "ELECT REPRESENTATIVES OF THEIR CHOICE" REQUIRES CONSIDERATION OF A GROUP'S DIRECT VOTING STRENGTH AND OF ITS ABILITY TO PARTICIPATE EFFECTIVELY IN COALITION POLITICS.

### A. Section Two Is Designed to Protect the Voting Strength of Minorities as a Group.

Appellants and the United States suggest that Section 2 creates a right *only* to the "opportunity to meaningfully participate in the political process."<sup>16</sup> They conclude that the statute protects only "equal access" to election machinery.<sup>17</sup> That assertion, rooted in the notion of individual access to the polling booth, ignores Section 2's additional guarantee to minorities of the "opportunity . . . to elect candidates of their choice"<sup>18</sup> and disregards the group nature of voting rights as recognized by this Court and by Congress.

The power to elect representatives is by its nature a group power, since no individual voter can achieve his or her objective unless joined by others supporting the

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see, e.g., *McMillan v. Escambia County*, 748 F.2d 1037, 1043 (5th Cir. 1984); *United States v. Dallas County Commission*, 739 F.2d 1529, 1534 n.2 (11th Cir. 1984).

<sup>16</sup> Brief for Appellants at 16; see Brief for United States at 14.

<sup>17</sup> See Brief for Appellants at 18; Brief for United States at 14-15.

<sup>18</sup> U.S.C. § 1973(b) (1982); see *supra* text at note 6.



same candidates.<sup>19</sup> Voting rights can, of course, be abridged by rules that prevent individuals from exercising the franchise. But they can be abridged also by electoral schemes that, in practice, dilute the collective weight given to the votes of members of a disfavored group. The Court has long recognized this group nature of voting rights, noting in *Reynolds v. Sims* that “federally protected [voting] right[s] suffer[] substantial dilution . . . [where a] favored group has full voting strength . . . [and t]he groups not in favor have their votes discounted.”<sup>20</sup>

Congress in amending Section 2 made evident its concern about the diminution of the group voting strength of racial minorities. As the Senate Report explained, “discriminatory election systems . . . [that] minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one’s vote fully count, just as much as outright denial of access to the ballot box.”<sup>21</sup>

It is precisely this concept of dilution of group voting strength that underlay the trial court’s characterization

<sup>19</sup> See Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial “Intent” and the Legislative “Results” Standards*, 50 Geo. Wash. L. Rev. 689, 691 (1982); Note, *supra* note 10, at 198.

<sup>20</sup> 377 U.S. 533, 555 n.29 (1964). The Court has used a group-oriented focus when adjudicating claims of malapportionment and gerrymandering. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring); *id.* at 765 (White, J., dissenting); *id.* at 784 (Powell, J., dissenting); *Gaffney v. Cummings*, 412 U.S. 735, 751, 754 (1973); *White v. Regester*, 412 U.S. 755, 765-70 (1973).

<sup>21</sup> S. Rep. No. 417, *supra* note 3, at 28; see also *id.* at 30 n.120; *United States v. Marengo County Commission*, 731 F.2d 1546, 1556 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *Wesley v. Collins*, 605 F. Supp. 802, 807-08 (M.D. Tenn. 1985); Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 761-63 (1983).

of the appropriate inquiry under Section 2—whether “a racial minority . . . is effectively denied the political power . . . that numbers alone would presumptively . . . give it in a voting constituency not racially polarized in its voting behavior.”<sup>22</sup> Appellants incorrectly characterize this “definition” as one that guarantees the outcome of the political process rather than the opportunity to participate in that process.<sup>23</sup> To the contrary, the trial court’s formulation does not guarantee electoral outcomes, but properly seeks to discern, from objective factors, whether minorities have an equal opportunity to participate in the electoral process and to elect candidates of their choice.

**B. The Factors Identified in the Legislative History Address the Ability of Racial Minorities to Exercise Direct Voting Strength and to Build Coalitions to Influence Elections in the Absence of Numerical Majorities.**

The factors identified in the Senate Report are best considered in an analytical framework that illuminates their relevance to establishing a Section 2 violation. Heretofore, courts have examined these factors somewhat mechanically, without identifying the principles that underlay Congress’ inclusion of them as relevant to the statutory inquiry. While the importance of each factor depends on the circumstances of the case, Congress endorsed the factors together as vehicles for assessing whether a racial group has an *opportunity* to elect representatives of its choice commensurate with its demographic strength.<sup>24</sup> The opportunity of a group to influence

<sup>22</sup> Dist. Ct. Op., 590 F. Supp. 345, 355 (E.D.N.C. 1984), *reprinted in* Jurisdictional Statement (J.S.) at 14a.

<sup>23</sup> Brief for Appellants at 19-20.

<sup>24</sup> Given the different sizes of racial groups, “equal” electoral opportunity necessarily means opportunity commensurate with a group’s voting strength. This does not mean commensurate representation, but rather commensurate ability to affect electoral outcomes. See *infra* text at notes 42-48.

electoral outcomes arises through two avenues, and it is to these two sources of electoral success that the factors listed in the Senate Report are addressed.

First and foremost, a racial group has a capacity, which increases with its share of the voting age population, directly to affect electoral outcomes by virtue of its own solidarity.<sup>25</sup> A group that constitutes a majority in a district has the capacity directly to determine an election, without regard to the votes cast by other groups. Such direct voting strength, however, can be diluted by electoral structures and practices that intentionally or inadvertently advantage some racial groups over others.

Second, if a racial group lacks the numerical strength directly to decide an election, it may nonetheless combine its strength with that of other groups to build more or less formal coalitions capable of electing candidates of the groups' mutual choice.<sup>26</sup> The greater a group's numerical strength, the less it must rely on aligning itself with other minorities in order to influence electoral outcomes. Here too, however, the electoral structure and the political and social context in which it operates can reduce the ability of a racial minority effectively to build such coalitions.

Several of the factors identified in the Senate Report are aimed at the first consideration—direct voting strength. A state's use of practices such as unusually large election districts and anti-singleshot provisions is

<sup>25</sup> A group's share of the *total* population of a district is not an accurate measure of its ability to influence electoral outcomes. This Court and lower federal courts have recognized that, because certain minority groups have a generally younger population and hence a smaller proportion of eligible voters, raw population figures may overestimate their voting strength. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir. 1984), *cert. denied sub nom. City Council v. Ketchum*, 105 S. Ct. 2673 (1985).

<sup>26</sup> R. Dahl, *Who Governs?* 249-50 (1974).

likely to reduce the direct voting strength of racial minorities.<sup>27</sup> Similarly, if a minority has been denied access to the candidate slating process preceding an election, its ability to exercise its numerical voting strength is diluted by virtue of its lack of a voice in determining what candidates will be put before the electorate. A strong history of voting discrimination in an area also may result in decreased voter registration and turnout today, because of lingering voter frustration and diminished perceived legitimacy of the electoral process.<sup>28</sup>

Other factors enumerated in the Senate Report shed light on whether racial minorities have the ability to build political coalitions in order to affect electoral outcomes. Of foremost relevance is the extent to which voting patterns in elections are racially polarized. Coalition politics presumes that groups are willing to combine forces with other groups having compatible (or at least not antithetical) goals or interests in order to elect candidates. But, where racial bloc voting exists, other numerical minorities resist forming coalitions with a racial minority solely because of its race and without regard to the political expediencies that otherwise underlie coalition-building decisions. For example, groups that share economic or other interests with blacks may nonetheless engage in coalition-building only with whites for racial reasons, thereby precluding blacks from fairly and equally participating in the election process.

For similar reasons, the fact that election rhetoric is based on racial appeals provides strong evidence that a racial minority does not have an equal opportunity to

<sup>27</sup> For a discussion of the implications of such mechanisms, see *infra* text at notes 54-55.

<sup>28</sup> This factor may be relevant as well to the ability of a minority group to participate effectively in coalition politics.

participate in coalition politics. And socioeconomic deprivation in the minority community, stemming from past discrimination, can have a similar significance, because it leads to depressed levels of political participation.<sup>29</sup> A disparity of socioeconomic status also may engender a lack of political savvy and a political agenda not shared by other groups, the latter making it less likely that the other groups will have cause to join forces with the racial minority. A lack of success by minority-backed candidates also may provide strong, quantitative evidence that minorities have not successfully participated in coalition-building. Finally, unresponsiveness of elected officials to the needs of the minority may be evidence of the same thing.<sup>30</sup>

<sup>29</sup> See, e.g., *White v. Regester*, 412 U.S. at 768; *United States v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir.), cert. denied, 105 S. Ct. 375 (1984); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir.), cert. denied, 434 U.S. 968 (1977). “[P]laintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.” S. Rep. No. 417, *supra* note 3, at 29 n.114.

<sup>30</sup> However, this factor is relevant principally to the existence of intentional discrimination. See *Rogers v. Lodge*, 458 U.S. 613, 625 (1982); *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir.), cert. denied, 105 S. Ct. 375 (1984). It thus has little importance in suits alleging discriminatory results under Section 2. The Senate Report states that “[u]nresponsiveness is not an essential part of plaintiff’s case” and that “defendants’ proof of some responsiveness would not negate plaintiff’s showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process.” S. Rep. No. 417, *supra* note 3, at 29 n. 116.

One of the factors listed in the Senate Report—whether the policy underlying the use of a standard or practice is tenuous—also appears to be an indirect measure of intentional discrimination. See *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1479 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364, 384 (5th Cir. 1984).

### III. THE LAWFULNESS OF A CHALLENGED PRACTICE SHOULD BE DETERMINED ON THE BASIS OF ITS IMPLICATIONS FOR THESE TWO MEANS OF INFLUENCING ELECTORAL OUTCOMES.

Appreciation of these two avenues for influencing electoral outcomes—direct voting strength and the ability to build coalitions—provides a basis for more coherent application of the Senate Report factors and for more reasoned and predictable identification of Section 2 violations. The weight to be given to each factor and, correspondingly, the nature of a plaintiff’s required showing, should turn on an evaluation of the manner in which the challenged practice affects a minority’s ability to influence electoral outcomes through each of these avenues in the context of the case.

As discussed below, this approach leads to the conclusion, with respect to single-member districts, that a scheme that either “fractures” a racial minority among districts or “packs” it excessively into a few districts violates Section 2 where racial bloc voting is significant or where other factors point to diminished coalition-building power in the minority group. With respect to multimember districts, which inherently dilute the voting power of all minorities, the proposed approach suggests that all such districts should be scrutinized closely to ensure that concentrations of racial minorities are not being foreclosed from enjoying equal electoral opportunity.

#### A. A Single-Member Districting Scheme That “Fractures” or “Packs” a Racial Group’s Direct Voting Strength Should Be Unlawful Unless Other Factors Indicate That the Group Can Participate Effectively in the Coalition-Building Process.

Single-member districts offer an obvious opportunity for local majorities directly to exercise group voting power to elect representatives of their choice. However, the drawing of single district lines can operate, “de-



signedly or otherwise,"<sup>31</sup> to reduce artificially the political strength of particular groups of voters.

Voter concentrations can be manipulated either by fracturing—the breaking up of cohesive population concentrations into multiple districts, leaving the members with little effective political influence in any district—or by packing—the drawing of district lines to concentrate a group in a single or a few districts in a proportion greatly exceeding that required to exercise direct voting power, thus reducing the group's political influence in any of the remaining districts.<sup>32</sup>

These mechanisms can minimize the ability of a cohesive group directly to influence electoral outcomes. As the Fifth Circuit noted in *Robinson v. Commissioners Court*:

"The most crucial and precise instrument of the . . . denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive voting community. . . . This dismemberment of the black community . . . [can] ha[ve] the predictable effect of debilitating the organization and decreasing the participation of black voters in county government."<sup>33</sup>

Indeed, these mechanisms can effectively dilute the voting strength even of a racial group that forms a majority of

<sup>31</sup> *Zimmer v. McKeithen*, 485 F.2d at 1304.

<sup>32</sup> See generally R. Morrill, *Political Redistricting and Geographic Theory* 14-15, 19-20 (1981); Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *Minority Vote Dilution* 85 (1984); Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 Iowa L. Rev. 1 (1973). The Court has often recognized the dangers of fracturing and packing in the constitutional context. See, e.g., *Burns v. Richardson*, 384 U.S. 73 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>33</sup> 505 F.2d 674, 679 (5th Cir. 1974). Such district lines "weigh the power of one race more heavily than another." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring).

the local population.<sup>34</sup> As a result, single-member districting schemes in which a "safe" minority district could have been created but was not, or in which minority group members are packed into a few districts in numbers far greater than necessary to produce "safe" districts, should receive close scrutiny under Section 2.<sup>35</sup>

Since coalition-building is an alternative means of influencing electoral outcomes, the lawfulness of such a scheme may turn on the extent to which the racial minority is able to participate effectively in that process. As noted above, probably the most significant impediment to the ability to build coalitions is the presence of racially polarized voting.<sup>36</sup> The trial court properly identified this factor as the "single most powerful factor in causing racial vote dilution."<sup>37</sup> The presence of racial polarization, however, is necessarily a matter of degree. In some cases, racial bloc voting may be so strong as to shut out entirely any candidate backed by a racial group that is less than a majority of the district's voters;<sup>38</sup> in others,

<sup>34</sup> For example, if a State contained 100 voters, 67 black and 33 white, a five-district system could in theory be gerrymandered such that white voters would outnumber blacks 11 to 9 in each of three districts while blacks would outnumber whites 20 to 0 in each of the other two. See generally Still, *Alternatives to Single-Member Districts*, in *Minority Vote Dilution* 249 (1984).

<sup>35</sup> See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 149 (5th Cir.), cert. denied, 434 U.S. 968 (1977); *Ketchum v. Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984), cert. denied sub nom. *City Council v. Ketchum*, 105 S. Ct. 2673 (1985); *Major v. Trece*, 574 F. Supp. 325, 352 (E.D. La. 1983).

<sup>36</sup> See Hartman, *supra* note 19, at 695.

<sup>37</sup> Dist. Ct. Op., 590 F. Supp. at 372, J.S. at 47a. *Accord United States v. Marengo County Commission*, 731 F.2d 1546, 1566 (11th Cir.), cert. denied, 105 S. Ct. 375 (1984); *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984); see *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

<sup>38</sup> See *Rogers v. Lodge*, 458 U.S. at 623; *Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir.), *aff'd*, 459 U.S. 801 (1982);

it may impair but not totally eradicate a minority's coalition-building power.<sup>39</sup> Such impairment, where districting has reduced the minority's direct voting strength, may significantly reduce the group's overall ability to achieve its electoral goals.

Faith to the statutory goal of equal electoral opportunity thus indicates that fracturing or packing of direct voting strength, combined with significant racial bloc voting, normally should trigger a Section 2 violation.<sup>40</sup> Since the greater the reduction in direct voting strength the more coalition-building that is needed to affect electoral outcomes, the degree of racial polarization that a plaintiff must show should decrease as the degree of demographic fragmentation or packing increases.

Even if racial bloc voting is not present to a degree that is significant in this context, other factors may indicate that the opportunity of a group to engage in coalition

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Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 Yale L.J. 974, 989 (1982).

<sup>39</sup> In the latter situation, the minority is denied an equal opportunity to influence electoral outcomes, even though the polarization is not so extreme as to guarantee the defeat of every minority-backed candidate. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 105 n.3 (1980) (Marshall, J., dissenting); Note, *supra* note 10, at 200 n. 67; Note, *supra* note 38, at 991-92.

Appellants thus are wrong in suggesting that racially polarized voting is insignificant under Section 2 unless it consistently prevents minority-backed candidates from winning any elections. See Brief for Appellants at 40. If that position were taken literally, the success of a single minority-backed candidate would compel a finding that no cognizable racial bloc voting exists. But such a single success obviously does not foreclose a conclusion that racial polarization has impaired the minority's coalition-building power. Congress' awareness that the ability to influence elections is a matter of degree is plain from its articulation of the "extent" of success of minority candidates as one of the factors under Section 2. See S. Rep. No. 417, *supra* note 3, at 28-29.

<sup>40</sup> See *Kirksey v. Board of Supervisors*, 554 F.2d 139, 151 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

politics—and thereby to affect electoral outcomes—is impaired. For example, if blacks continue to suffer serious socioeconomic effects from past discrimination, or if elections are marked by race-based appeals, those factors may establish that blacks are unable to form coalitions that will influence electoral outcomes.<sup>41</sup>

One further type of relevant evidence obviously is a lack of success in electing minority candidates or others endorsed by the minority community. The greater the disparity between the proportion of such elected officials and the minority's share of the population, the stronger the inference that the minority does not effectively participate in the coalition-building process.<sup>42</sup> Consideration of electoral outcomes as evidence of the inability of a racial minority to build coalitions, of course, does not amount to the creation of a statutory right to proportional representation. Congress made clear that outcomes are a relevant consideration in identifying Section 2 violations.<sup>43</sup>

At the same time, it is clear also that the "election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote.'" <sup>44</sup> Appellants' suggestion that recent electoral successes by blacks bar a finding of unequal opportunity <sup>45</sup> thus cannot be correct. The races of successful candidates are only one piece of evidence of a racial minority's opportunity to influence electoral outcomes. Just as victories by white candidates

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<sup>41</sup> See *supra* text preceding note 29.

<sup>42</sup> See *White v. Register*, 412 U.S. 755, 766-69 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976); see also *NAACP v. Gadsden County School Board*, 691 F.2d 978 (11th Cir. 1982); Note, *supra* note 10, at 205.

<sup>43</sup> See *supra* note 6.

<sup>44</sup> S. Rep. No. 417, *supra* note 3, at 29 n. 115, quoting *Zimmer v. McKeithen*, 485 F.2d at 1307.

<sup>45</sup> See Brief for Appellants at 24.

may, in light of all other evidence, be consistent with a finding that blacks enjoy equal voting power, victories by particular black candidates may be consistent with a finding that blacks' opportunity to affect electoral outcomes is diluted. A black candidate's success at the polls may be explained by a variety of factors.<sup>46</sup> Failure to elect a proportionate number of representatives does not in itself trigger a finding of a statutory violation;<sup>47</sup> and some measure of success in a particular election does not bar such a finding.<sup>48</sup>

**B. Multimember Districts That Subsume Large Minority Populations Dilute the Direct Voting Power of Such Groups and Should Be Closely Scrutinized.**

**1. Multimember Districts Inherently Dilute the Direct Voting Strength of Minorities.**

The creation of a multimember or at-large district tends to reduce the direct voting strength of a racial (or any other) minority subsumed within the district, particularly where the group could have constituted a majority in one or more of the single districts that could have been created in lieu of the multimember one. Multimem-

<sup>46</sup> For example, white politicians may find it expedient to support a "token" minority representative whose views they find acceptable. See Avila, *Mobile Evidentiary Analysis*, in *The Right to Vote* 125, 133 (Rockefeller Foundation Conf. Rep. 1981); Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla. St. U.L. Rev. 85 (1979). Or they may even support a minority candidate in order to thwart a legal challenge to the electoral scheme on dilution grounds. See *Zimmer v. McKeithen*, 485 F.2d at 1307. The latter possibility is especially likely where, as here, the electoral scheme was challenged prior to the recent successes of the minority candidates. See Dist. Ct. Op., 590 F. Supp. at 367 n.27, J.S. at 37a n.27.

<sup>47</sup> See *supra* note 6.

<sup>48</sup> Electoral successes commensurate with a minority's share of the population over a significant period of time might, of course, constitute substantial evidence that the group enjoys equal electoral opportunity, depending on the other facts of the case.

ber districts, though not unlawful *per se* under Section 2,<sup>49</sup> thus require close scrutiny under that section.

In an at-large system, a majority of the population of the district controls the election of each of the at-large legislators. The Court has recognized on numerous occasions that such a "winner-take-all" voting system by definition denies to every numerical minority the proportionate direct voting power it could have in single-member districts. In *Rogers v. Lodge*, the Court explained:

"At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts."<sup>50</sup>

Congress also recognized the inherent dilutive effect of multimember districts in enacting the 1982 Act.<sup>51</sup>

<sup>49</sup> H.R. Rep. No. 227, *supra* note 7, at 30; S. Rep. No. 417, *supra* note 3, at 23-24, 27. In so concluding, Congress appears to have followed several Supreme Court cases that had declined to hold at-large districting unconstitutional *per se*. See *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Fortson v. Dorsey*, 379 U.S. 433, 438-39 (1965); see also *Zimmer v. McKeithen*, 485 F.2d at 1304. Those cases, of course, leave open the possibility that an at-large district may be unconstitutional where it operates under the circumstances to dilute the voting strength of racial minorities.

<sup>50</sup> 458 U.S. 613, 616 (1982) (emphasis in original); see also *City of Mobile v. Bolden*, 446 U.S. 55, 65-66 (1980) (plurality opinion); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (1971); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). See generally Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353 (1976); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. Pa. L. Rev. 666 (1972).

<sup>51</sup> The House Report explains that "at-large elections are one of the most effective methods of diluting minority [voting] strength



Multimember districting also tends to dilute the voting strength of racial minorities in more subtle ways. For example, it contributes to the election of representatives lacking close ties to the voters in particular communities; hence, identifiable constituencies have no one member specifically charged with representing their interests.<sup>52</sup> At-large systems also contribute to voter confusion, because ballots in such systems necessarily are more bulky and difficult to comprehend.<sup>53</sup>

The dilutive effects of multimember districts can be magnified or reduced by a state's adoption of certain structural features. Some of those features—identified in the legislative history of the 1982 Act<sup>54</sup>—can strip away further a minority's opportunity to influence elections. For example, a majority-win rule, requiring a runoff if no candidate receives more than half of the votes cast, may, in some instances, prevent a minority candidate from winning where the majority vote is split between two majority candidates. Numbered post provisions, allowing each voter to vote for only one candidate for each numbered seat, prevent a minority from concentrating its votes to take advantage of a split among majority group voters. Anti-singleshot voting provisions, too, by requir-

in the covered jurisdictions," H.R. Rep. No. 227, *supra* note 7, at 18, and acknowledges that "numerous empirical studies based on data collected from many communities have found a strong link between at-large elections and lack of minority representation." *Id.* at 30.

<sup>52</sup> This effect is heightened if the scheme lacks any requirement that members come from each of the implicit wards within the at-large scheme. See *White v. Regester*, 412 U.S. 755, 766 n.10 (1973); *Zimmer v. McKeithen*, 485 F.2d at 1305.

<sup>53</sup> See, e.g., *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Chapman v. Meier*, 420 U.S. 1, 15 (1975); *Wallace v. House*, 515 F.2d 619, 627 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976).

<sup>54</sup> See *supra* note 12; see also H.R. Rep. No. 227, *supra* note 7, at 30; S. Rep. No. 417, *supra* note 3, at 29.

ing each voter to cast a ballot for as many candidates as there are offices to be filled, prevent targeted voting, forcing racial minorities to vote for white candidates where the number of open seats exceeds the number of minority candidates. Finally, an election scheme under which the terms of offices are staggered minimizes the potential for vote-splitting among the majority group by making fewer seats open at any time.<sup>55</sup>

On the other hand, other structural features can compensate for the naturally dilutive effects of an at-large system. These include cumulative voting<sup>56</sup> and limited voting procedures.<sup>57</sup> Or a state can take a hybrid approach by superimposing an at-large scheme on top of a system of single-member districts, so that some repre-

<sup>55</sup> This Court and commentators have emphasized the inherently dilutive character of each of these structural provisions. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 627 (1982); *City of Rome v. United States*, 446 U.S. 156, 184 n.20 (1980); *White v. Regester*, 412 U.S. 755, 756 (1973); *Zimmer v. McKeithen*, 485 F.2d at 1305; Davidson, *Minority Vote Dilution*, in *Minority Vote Dilution* 6-7 (1984); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 358-59 (1976); Derfner, *Racial Discrimination and The Right to Vote*, 26 Vand. L. Rev. 523, 553 n.125 (1973); Howard and Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1658-59 n.184 (1983); Note, *supra* note 38, at 993-94.

<sup>56</sup> With cumulative voting, voters in multimember districts are permitted to cast multiple votes for a single preferred candidate. By enabling minority groups to concentrate their votes on a single or a few minority candidates, cumulative voting enhances minority voting strength. See, e.g., *United States v. Marengo County Commission*, 731 F.2d 1546, 1560 n.24 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); R. Dixon, *Democratic Representation* 523-25 (1968); E. Lakeman, *How Democracies Vote* 87-91 (1974).

<sup>57</sup> Under a limited voting procedure, citizens are given fewer votes than the number of offices to be filled, minimizing the "winner-take-all" bias inherent in multimember systems. See, e.g., *United States v. Marengo County Commission*, 731 F.2d at 1560 n.24; R. Dixon, *supra* note 56, at 521-23.

sentatives are elected according to each method.<sup>58</sup> The use of such procedures, under appropriate circumstances, enables states to "retain the perceived benefits of at-large representation while providing opportunities for effective minority participation."<sup>59</sup> Where these compensatory mechanisms are present, a multimember scheme may give minorities an effective opportunity to exercise their direct voting strength. However, absent such mechanisms—and particularly if additional features exacerbating dilutive effects are present—multimember districts should be regarded as inherently suspect under Section 2.<sup>60</sup>

**2. The Need for Proof of Racial Polarization or Other Factors Impairing a Minority's Ability to Build Coalitions Should Be Less Where Concentrations of Minority Voters are Subsumed in Multimember Districts.**

The dilution of a minority's direct voting strength by multimember districts necessitates greater success in co-

<sup>58</sup> See *City of Mobile v. Bolden*, 446 U.S. 55, 82 (1980) (Blackmun, J., concurring); *United States v. Marengo County Commission*, 731 F.2d at 1560 n.24; *NAACP, Inc. v. City of Statesville*, 606 F. Supp. 569 (W.D.N.C. 1985); *James v. City of Sarasota*, No. 79-1031-Civ-T-GC (D.C. Fla. Jan. 25, 1985).

<sup>59</sup> *United States v. Marengo County Commission*, 731 F.2d at 1560 n.24.

<sup>60</sup> In certain limited instances, replacing an at-large system with a single-member scheme might dilute minority voting strength even further. If a racial group is very small or its members are spread relatively evenly throughout the area, then no single-districting scheme can be established that will enable the group to exert a strong political influence even in one district within a single-member scheme. See, e.g., *Dove v. Moore*, 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); *Zimmer v. McKeithen*, 485 F.2d at 1308. In other rare instances, the use of a multimember scheme may be constitutionally compelled by the one-person-one-vote requirement. See *id.* at 1308. However, absent these unusual situations, the preference for "safe" single-member districts over multimember districts reflects Congress' "political judgment," Dist. Ct. Op., 590 F. Supp. at 357, J.S. at 18a, as to the most appropriate vehicle for identifying and eliminating the vestiges of racial discrimination.

alition-building if a racial minority is to influence election outcomes. As a result, any racial bloc voting will be especially destructive of a minority's opportunity to elect representatives of its choice. Thus, the amount of racial polarization necessary to warrant a conclusion that a group's ability to participate in coalition politics is impaired should be even less than would be required in the context of single-member districts.

Indeed, where a concentrated population of minority voters has its direct voting strength diluted through submergence in a multimember district, and where elections in that district have not produced success by minority candidates commensurate with the minority's demographic strength, any evidence of more than *de minimis* racial bloc voting normally should suffice to show a Section 2 violation. The same should be true with respect to other factors evidencing impairment of a minority's opportunity to engage in coalition politics.<sup>61</sup>

**IV. APPLYING THESE PRINCIPLES, THE COURT SHOULD AFFIRM THE JUDGMENT BELOW.**

When the trial court's findings of fact are considered in relation to the statutory framework described above, it is clear that blacks in each of the challenged multimember districts do not enjoy equal electoral opportunity.<sup>62</sup> The court based its findings on an "intensely local

<sup>61</sup> See, e.g., *United States v. Marengo County Commission*, 731 F.2d 1546, 1566 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); *Wesley v. Collins*, 605 F. Supp. 802, 812 (M.D. Tenn. 1985); *supra* text at notes 41-42.

<sup>62</sup> We do not understand that there remains any issue concerning the lawfulness of Senate District No. 2, a single-member district. *Accord Brief for United States* at 7 n.11. We thus do not discuss that district, except to note that the trial court's findings of fracturing in that district and of "severe and persistent racial polarization in voting," Dist. Ct. Op., 590 F. Supp. at 358, 372, J.S. at 20a-21a, 46a, provide ample basis for its holding that the district violates Section 2.



appraisal”<sup>63</sup> of the structure and operation of the challenged schemes. The findings firmly establish that blacks in these districts are foreclosed from employing direct voting strength and hampered in their ability to engage in coalition politics.

There can be no doubt that blacks are denied an equal opportunity to exercise their direct voting strength to achieve electoral success. The court found that concentrations of blacks within the boundaries of each of the challenged districts were sufficient to constitute majorities in single districts, which would have enabled them to elect candidates through their own solidarity.<sup>64</sup> The submergence of these black concentrations instead into large multimember districts in which blacks are relatively small minorities<sup>65</sup> greatly diluted blacks’ direct voting strength. Moreover, the level of political participation by black citizens was significantly depressed as a result of discrimination in prior elections.<sup>66</sup> The resulting registration gap between blacks and whites even further diminished the direct voting strength of the black population.

In addition, the challenged schemes contain features that exacerbate the inherently dilutive effect of these multimember districts. First, the trial court found that North Carolina’s majority-vote requirement for all primary elections under the circumstances presents an “on-going impediment to any cohesive voting minority’s op-

<sup>63</sup> *White v. Regester*, 412 U.S. 755, 769 (1973).

<sup>64</sup> Had single districts been created, blacks would have constituted majorities ranging from 62.7 percent in House District No. 8 to 71.2 percent in House District No. 36. Dist. Ct. Op., 590 F. Supp. at 357-58, J.S. at 19a-20a.

<sup>65</sup> The percentages of blacks in the total populations of the multimember districts ranged from 21.8 percent in House District No. 21 to 39.5 percent in House District No. 8. The percentages of blacks in the registered-voter populations of these districts ranged from 15.1 to 29.5 percent. *Id.* at 357, J.S. at 19a.

<sup>66</sup> *Id.* at 360-61, J.S. at 24a-26a.

portunity to elect candidates of its choice . . . .”<sup>67</sup> Second, the State’s lack of a subdistrict residency requirement<sup>68</sup> enables the elected representatives to come disproportionately from outside the predominantly black neighborhoods of the multimember districts. The dilutive effect of these features is compounded by the fact that the size of these multimember districts is unusually large.<sup>69</sup>

In these circumstances, close scrutiny is necessary to ensure that blacks are capable of engaging in coalition politics in these districts to the extent required to afford them equal electoral opportunity. The trial court’s findings amply demonstrate that they are not. After reviewing extensive statistical and direct evidence, the trial court found significant racial polarization in each of the challenged districts.<sup>70</sup> Not only did it find an almost

<sup>67</sup> *Id.* at 363, J.S. at 30a. Contrary to Appellants’ claim, it is irrelevant whether a black candidate demonstrably has lost an election because of such structural features. See Brief for Appellants at 27-28. Such an argument not only ignores the fact that racial vote dilution can be significant without being absolute, but it fails to consider the interrelationship of such features with other impediments to black electoral success. For example, the trial court noted that the majority-vote requirement is especially harmful where racial polarization exists. See Dist. Ct. Op., 590 F. Supp. at 363, J.S. at 30a. It noted also that, in recent years, black candidates for Congress and Lieutenant Governor who led in the first Democratic primary lost in the runoff election mandated by the majority-vote requirement. *Id.*

<sup>68</sup> Dist. Ct. Op., 590 F. Supp. at 363, J.S. at 30a.

<sup>69</sup> Tr. at 133 (Testimony of Dr. B. Grofman).

<sup>70</sup> Dist. Ct. Op., 590 F. Supp. at 367-72, J.S. at 38a-46a. In challenging the trial court’s finding of racial bloc voting, Appellants and the United States erroneously focus on selective data concerning the percentages of white votes received by a few black candidates. See Brief for Appellants at 36-38; Brief for United States at 32-33. That focus, out of context, can be highly misleading. For example, both briefs stress that a black candidate (Berry) received 50 percent and 42 percent of the white vote in the primary and general



unprecedented correlation between the race of voters and the race of the candidates for whom they voted,<sup>71</sup> but white voters consistently exhibited a strong reluctance to vote for black candidates under any circumstances.<sup>72</sup> Such severe racial polarization should be ample, given the dilutive features of these multimember districts and their demographic and historical contexts, to support the trial court's conclusions that the districts violate Section 2.

The trial court's additional findings on the prevalence of subtle racial appeals in election campaigns<sup>73</sup> and on the disadvantaged educational, employment, and health status of blacks stemming from past intentional discrimination<sup>74</sup> buttress this conclusion, as does the court's finding of persistent underrepresentation of black-supported

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election for House District No. 36 in 1982. The trial court specifically addressed the misleading nature of this statistic, pointing out that in the primary there were only seven white candidates for eight positions so that at least one black *had* to be elected, and that in the general election a solid majority of white voters refused to vote for any black candidates. Dist. Ct. Op., 590 F. Supp. at 369, J.S. at 42a.

<sup>71</sup> Dist. Ct. Op., 590 F. Supp. at 367-68 & n.30, J.S. at 38a-40a & n.30.

<sup>72</sup> For example, the trial court found that white voters almost universally ranked black candidates last or next to last among all candidates, and that most refused to support black candidates in general elections even when they were running against candidates of the party the whites would otherwise oppose or when black incumbents ran uncontested. *Id.* at 368, J.S. at 40a.

<sup>73</sup> *Id.* at 364, J.S. at 31a-32a.

<sup>74</sup> *Id.* at 361-63, J.S. at 26a-29a. The trial court found that these disadvantages resulted in significantly depressed levels of socio-economic well-being for blacks, giving "rise to special group interests centered upon those factors." *Id.* at 363, J.S. at 29a. This disjunction between the political agenda of blacks and whites significantly reduces the impetus for whites to engage in coalition-building with blacks.

candidates at all levels of government.<sup>75</sup> The court's finding of black underrepresentation was based not on a rule of thumb of "proportional representation," as Appellants suggest,<sup>76</sup> but on the court's analysis of the results of elections held in each challenged district and the electoral contexts that generated those results.<sup>77</sup> Though acknowledging the recent election of a few black candidates, the trial court found compelling reasons to doubt that those results demonstrated equal electoral opportunity,<sup>78</sup> and found the "overall results achieved to date at all levels of elective office . . . minimal in relation to

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<sup>75</sup> *Id.* at 367, J.S. at 37a.

<sup>76</sup> Brief for Appellants at 19.

<sup>77</sup> Dist. Ct. Op., 590 F. Supp. at 364-66, J.S. at 32a-36a. By selectively focusing on certain races and ignoring the circumstances of those races, Appellants and the United States draw unwarranted inferences about blacks' ability to influence the political process. For example, the United States infers that blacks enjoy equal electoral opportunity in House District No. 23 by virtue of the election of a black member to a three-person House delegation where blacks constitute 36.3 percent of the population. Brief for United States at 22. Such an inference is unsound: The trial court points out that only two white candidates decided to enter the race for three seats. A black candidate therefore had to win. *See* 590 F. Supp. at 368, J.S. at 40a. In addition, the court noted that no black had ever been elected to the Senate from the area comprising District 23, and that only 25 percent of the City Council members are black despite a 47 percent black voting population. *Id.* at 366, J.S. at 35a. The United States also emphasizes that two of five House delegates in District No. 39 are black while blacks constitute only 25 percent of the population, *see* Brief for United States at 20, but ignores the court's additional findings that only one of eight Board of Education members is black, that only one of five City Commissioners is black, and that no blacks have ever been elected to the Senate from that area. *See* Dist. Ct. Op., 590 F. Supp. at 366, J.S. at 35a.

<sup>78</sup> For example, the court concluded that the somewhat higher level of success experienced by black candidates in 1982 compared to previous years likely was caused by the pendency of this very lawsuit, which encouraged white political leaders to support token black candidates in order to forestall success by plaintiffs. *See* Dist. Ct. Op., 590 F. Supp. at 367 n.27, J.S. at 37a n.27.

the percentage of blacks in the total population.”<sup>79</sup> These additional findings leave no doubt that blacks in these multimember districts are hindered in engaging in coalition politics, and under the circumstances are being denied equal electoral opportunity.

### CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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<sup>79</sup> *Id.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,  
*Appellants,*  
v.

RALPH GINGLES, *et al.*,  
*Appellees.*

On Appeal from the United States District Court  
for the Eastern District of North Carolina

BRIEF AMICUS CURIAE OF THE  
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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,  
v. *Appellants.*

RALPH GINGLES, *et al.*,  
*Appellees.*

**On Appeal from the United States District Court  
for the Eastern District of North Carolina**

**BRIEF AMICUS CURIAE OF THE  
REPUBLICAN NATIONAL COMMITTEE  
IN SUPPORT OF APPELLEES**

The Republican National Committee submits this brief as *amicus curiae* in support of appellees' claim that the judgment of the United States District Court for the Eastern District of North Carolina, entered on January 27, 1984, together with its supplemental judgment of April 20, 1984, should be affirmed. Pursuant to Rule 36.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

### INTEREST OF THE AMICUS

The Republican National Committee (RNC) submits this brief on its own behalf, and on behalf of Robert Bradshaw, Charlotte, North Carolina, Chairman of the

North Carolina Republican Executive Committee and a member of the Republican National Committee.

The RNC has participated in a variety of election law and voting rights cases before this Court as either a party or *amicus*, most recently in *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Davis v. Bandemer*, 603 F. Supp. 1479 (S.D. Ind. 1984), *prob. juris. noted*, No. 84-1244 (Mar. 29, 1985). The RNC and its membership support fair and effective representation for all the citizens of North Carolina in their state legislature and believe that the judgment of the court below effects such a result.

The *amicus* also believes that the appellants misrepresent both the nature of legislative representation in North Carolina and the effect of the judgment below.

#### SUMMARY OF THE ARGUMENT

The *amicus* Republican National Committee takes issue with the argument of the appellants that the judgment of the district court either implicitly or explicitly imposed a requirement of proportional representation for blacks in the North Carolina legislature. The district court's initial, January 27, 1984, opinion reveals no attempt at maximization, and the court's April 20, 1984, supplemental clearly demonstrates that the court rejected the notion of maximization or proportional representation that appellants now attempt to ascribe to the court.

Rather than impose what the court thought, intuitively, to be the plan which *did* maximize black electoral chances—a plan the plaintiffs themselves proposed to the court—the district court instead deferred to the priorities established by the North Carolina legislature and adopted the state's plan as a remedy.

In reaching its conclusions in both its initial and supplemental opinions, the district court reviewed a complex factual scenario, and its findings as to both subsidiary and ultimate facts should be sustained unless clearly

erroneous. The facts in this case are peculiarly local in nature, the determination of which is particularly suited to the district court. Not only was the district court's finding as to a key fact—the presence of polarized voting—not clearly erroneous, the expert testimony upon which the court based its finding was not seriously contested. The *amicus* believes that this case is bound by its particular facts, and is an inappropriate vehicle for considering the merits of the standards for review under Section 2 of the Voting Rights Act.

#### ARGUMENT

##### I. The District Court Properly Refused to Guarantee Proportional Minority Representation.

Of particular interest to the RNC as *amicus* is the appellants' claim that, since minority voters have no right to the creation of districts which would yield representation in proportion to their numbers, the district court erred in finding a Voting Rights Act violation.

It is clear that the Voting Rights Act, and in particular, Section 2 of the Act, imposes no requirement that any minority achieve representation in proportion to its numbers in the population. The statute, as amended in 1982, provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (1982). This language is consistent with this Court's approach to the question of proportional representation in both constitutional and statutory voting rights cases.<sup>1</sup> The district court explicitly recognized and adopted that approach in its opinion. *Gingles v. Edmisten*, 590 F. Supp. 345, 355 (E.D.N.C. 1984):

<sup>1</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980); *United Jewish Organizations v. Wilson*, 510 F.2d 512 (2d Cir. 1974), *aff'd sub nom. United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).



Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population [alone establish that vote dilution has resulted from the districting plan.] (Citing *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam)).

The *amicus* Republican National Committee has historically been a proponent of strong, majoritarian government in the United States. Ours is not, nor should it be, a proportional system of government. The views of the RNC in this regard were set forth in detail in another voting rights case pending before this Court, *Davis v. Bandemer*, No. 84-1244.<sup>2</sup>

<sup>2</sup> Instead of requiring that legislatures do the impossible by providing proportional representation for all political interests, this Court has prudently required only that the electoral process be structured in ways that permit each voter an equal opportunity to select his legislative representative and thereby be given an equal chance to influence public policy. This Court's focus must continue to be on emphasizing procedural fairness in the political process by requiring that redistricting laws "provide a just framework within which the diverse political groups in our society may fairly compete." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982), (citing *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring)).

The RNC explicitly rejects the notion that the creation of "safe" minority districts is the only available remedy under Section 2 of the Voting Rights Act, and agrees with the appellants that such a rule of law would be undesirable. The creation of permanent, safe districts for any minority, racial or political, is antithetical to our majoritarian system of government, and institutionalizes the very proportional government this Court has rejected. In its brief in *Davis v. Bandemer*, *supra*, the RNC argued strongly that legislative districts which are designed to be non-competitive to the exclusion of one political party are both constitutionally and philosophically repugnant. The inherent tension between proportional representation in racial equal protection cases and what has been called the "emerging political norm" has been recognized and discussed at length in Howard and Howard, *The Dilemma of the Voting Rights*

The *amicus* does not dispute the appellants' contention that Congress clearly had no intention to invalidate districting plans where minority candidates have had an equal opportunity to be elected, even if they did not necessarily win a proportional share of the seats. However, while no group has either a statutory or constitutional right to proportional representation, the statute does not prohibit *any* consideration of the relative representation of a protected class. In fact, the 1982 amendments do permit consideration of "the extent to which members of the minority group have been elected to public office in the jurisdiction" as part of the "totality of circumstances" which may be probative of vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. 193 *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07. In assessing the success of black candidates, the court below concluded that:

[The] success that has been achieved by black candidates is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunity to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant factor in the political processes of the state—either generally or specifically in the areas of the challenged districts. 509 F. Supp. at 367.

The appellants correctly point out that "Section 2 of the Voting Rights Act does not entitle protected minorities . . . to safe electoral districts simply because a minority concentration exists sufficient to create such a district." Appellants' Brief at 19. However, the appellants then suggest that the opinion below mandates just that sort of proportional representation.

*Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). That tension, however, does not exist in this case because the district court did not endorse but rather, explicitly rejected a maximization plan.

The appellants attempt to isolate the remedial action of the district court from its initial judgment. This presents an incomplete picture of the district court's reasoned approach to the proportional representation issue.

After the district court enjoined certain elections under the challenged plan, the North Carolina General Assembly responded by enacting, in the form of six new bills, a redistricting plan creating new boundaries for each of the invalidated districts. On March 12, 1985, the state submitted these plans to the district court for its approval, and contemporaneously submitted the plan to the Attorney General of the United States for pre-clearance insofar as the changes affected districts covered by Section 5 of the Voting Rights Act.

Three days later, on March 15, the plaintiffs objected to the proposed plan and requested modifications, in particular with respect to the areas covered by former House Districts 8 and 36. The district court denied the plaintiffs' motion for further depositions and a hearing on the question of the remedial adequacy of the state's plan, and resolved to decide the question of the state's compliance on the record as then extant. 590 F. Supp. at 377.

Although they did not concede the plan's validity in other respects, the plaintiffs objected specifically to the area comprising the Mecklenburg district, contending that the plan fractured substantial black population concentrations. These populations were insufficient to constitute another voting majority, but plaintiffs argued that they might, nonetheless, give that minority population considerable voting power as a substantial voting minority in at least one of the newly constructed single member districts. *Id.* at 379. This newly "packed" district would have contained a black population of 44.7 percent. *Id.* at 380 n.1. By contrast, none of the white majority districts under the state's plan contained black populations in excess of 28.2 percent. *Id.*

The court characterized the plaintiffs' proposal as requiring that "a state redistricting plan adopted to remedy judicially found dilution by submergence (or fracturing) of effective vote majorities must not only remedy the specific violation found but also maximize . . . the voting strength of those black voters outside the remedially drawn single-member districts." *Id.* The court wisely rejected the plaintiffs' invitation to maximize minority voting strength, relying upon Section 2 jurisprudence and equitable considerations. *Id.* at 382.

The court's factual findings led it to a conclusion that the challenged plan violated Section 2. Having so determined, the court's January 27 opinion must be reviewed together with its supplemental opinion. By explicitly rejecting, in its supplemental opinion, a proposal that *would* have maximized minority voting strength, the district court demonstrated that its goal was not proportional representation. The district court's opinion does not hold that blacks—or any minority—are entitled to proportional representation. Remarkably, appellants failed to reproduce this supplemental opinion in their Jurisdictional Statement, but instead invoked this Court's jurisdiction on the basis of an incomplete record.

## II. The District Court Properly Deferred to Legislative Priorities In Considering A Remedy.

Even prior to the remedial stage of this litigation, the district court resolved to defer to "the primary jurisdiction of state legislatures over legislative reapportionment." 590 F. Supp. at 376. The court noted that this was especially appropriate where the legislature had been afforded no previous legislative opportunity to assess the substantial new requirement under the 1982 amendments to Section 2 of the Voting Rights Act for affirmatively avoiding racial vote dilution rather than merely avoiding its intentional imposition. *Id.*



Furthermore, the court recognized "the difficulties posed for the state by the imminence of 1984 primary elections" and offered to convene at any time upon the request of the state to consider and promptly rule upon proposed remedies. *Id.*

In its supplemental opinion, the district court recognized that neither the Voting Rights Act nor equitable considerations require—and neither do they permit—"the rejection of a legislative plan simply because the reviewing court would have adopted another thought to provide a better, more equitable overall remedy for the originally found vote dilution." 590 F. Supp. at 382. The court noted that such a principle of judicial deference to legislative aims clearly applies in constitutional redistricting cases, *White v. Weiser*, 412 U.S. 783, 794-97 (1972), and properly extended that deference to its analysis under the Voting Rights Act. *Cf. Upham v. Seamon*, 456 U.S. 37 (1982).

The court refused to accept plaintiffs' suggestion that racial vote dilution may be found "not only with respect to aggregations of black voters large enough to make up effective voting majorities in single-member districts, but with respect to smaller aggregations as well," and that dilution in that sense resulted from the state's remedial plan with respect to black aggregations outside the remedially-affected single-member districts. 590 F. Supp. at 380. In considering whether, under the circumstances of a particular case, a 28.2 percent black minority may have less voting strength than a 45 percent minority, the court noted that such a determination depended, among other things, upon the philosophical-political makeup of the population majorities in the district.

The court refused to substitute its "intuitive" sense that the overall voting strength of blacks might be enhanced by packing them into a 45 percent minority district and, as a result, refused to substitute the plaintiffs' proposal for the state's.

### III. The District Court's Findings of Fact Are Not Clearly Erroneous, But Are Based On A Particularly Localized Factual Record.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous, with due regard to be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52 (1984). This Court has enunciated general principles governing the exercise of an appellate court's power to overturn findings of a district court and has stated that the "foremost of these principles . . . is that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.'" *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)." *Anderson v. City of Bessemer City*, — U.S. —, 53 U.S.L.W. 4314 (Mar. 19, 1985).

As this Court recently emphasized in *Anderson, supra*, "this standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.*

The appellants' principal objection to the opinion below is the district court's findings with respect to racial polarization. Appellant's Brief at 27, 34-35. While the *amicus* is not in a position to express a view as to whether or not racially polarized voting does exist in North Carolina, we do believe that the district court's determination that it does exist was not clearly erroneous. In fact, there was no significant difference in the testimony of opposing experts on this issue.

Plaintiff's expert, Dr. Bernard Grofman, used an "extreme case" analysis (focusing on voting in racially segregated precincts) and an "ecological regression" analysis (focusing on both racially segregated and racially mixed



precincts). Determining that the results under both analyses conform closely in most areas, Dr. Grofman opined, and the court found, that racial polarization did exist and was statistically significant. 590 F. Supp. at 367-368 and n.29.

Defendants' expert, Dr. Thomas Hofeller, had studied Dr. Grofman's data and heard his live testimony. The court noted that, "[a]side from two mathematical or typographical errors, Dr. Hofeller did not question the accuracy of the data, its adequacy as a reliable sample for the purpose used, nor that the methods of analysis used were standard in the literature." *Id.* at 368. While Dr. Hofeller did question the reliability of an extreme case analysis when standing alone, the court noted that he had made no specific suggestion of error in the figures used.

The court further noted that the general accuracy and reliability of Dr. Grofman's data were confirmed by the testimony of Dr. Theodore Arrington, expert witness for the intervenor-plaintiffs. "Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization. . . ." *Id.* at 368 n.29.

The district court's finding on this subsidiary fact was not the subject of extensive dispute between the parties' experts, but was a reasonable finding about which there was, in fact, some degree of agreement among the experts. As this Court has recently confirmed:

[When] a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding if not internally inconsistent, can virtually never be clear error. *Anderson v. City of Bessemer City, supra* at 4317.

Nor does Rule 52 make an exception to applying the clearly erroneous standard to this finding on the basis

that it is merely one of several subsidiary facts. The rule does not make exceptions or purport to exclude certain categories of factual findings from the obligation of an appellate court to accept the district court's findings. The rule "does not divide facts into categories; in particular it does not divide findings of fact into those that deal with 'ultimate' facts and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

The facts in this case lend themselves to a local consideration particularly suited to the trial court. The facts in this case are further complicated by North Carolina's schizophrenic status under the Voting Rights Act. Only 40 of its 100 counties are subject to the preclearance provisions of Section 5 of the Act, and that divided coverage results in different standards of review within the same state under the two sections of the Act.

The numerous factual discrepancies in the briefs on appeal have further muddled an already obscure factual record. Supplemental Briefs of Appellees and Appellees-Intervenors. These disputes, and the particularly localized circumstances in this case, make it an inappropriate vehicle for a comprehensive review by this Court of the substance of, and standards under, the 1982 Amendments to the Voting Rights Act.

The three members of the district court panel were residents of North Carolina who conscientiously sorted the complex local factual issues presented to them. In such a case, deference to the factual findings of the district court is particularly warranted.

**CONCLUSION**

The decision of the United States District Court below  
should be affirmed.

Respectfully submitted,

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August 30, 1985

BEST AVAILABLE COPY



No. 83-1968

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1985

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LACY H. THORNBURG, *et al.*,

*Appellants,*

v.

RALPH GINGLES, *et al.*,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

---

**Motion for Leave to File Brief *Amicus Curiae***

The Honorable James G Martin, Governor of North Carolina, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the appellee has been obtained. The consent of the attorney for the appellant has been requested but refused.

The interest of Governor Martin arises from his position as the chief executive of the State of North Carolina, and hence, as the senior elected representative of all North Carolinians.

In the instant case the appellant argues that the recent electoral success of some minority candidates makes the District Court's findings of racial vote dilution clearly erroneous. The brief which Governor Martin is requesting to file argues that the District Court's finding is clearly

correct and that perpetuation of North Carolina's multi-member district system, particularly in those districts where its discriminatory effects have been established, will hinder his efforts to open the political process in North Carolina to all of its citizens.

Respectfully submitted,

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August 30, 1985

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

---

## BRIEF OF *AMICUS CURIAE*, THE HONORABLE JAMES G. MARTIN, GOVERNOR OF NORTH CAROLINA, SUPPORTING APPELLEES

The Honorable James G. Martin, Governor of the State of North Carolina, submits this brief *amicus curiae* in support of the decision of the United States District Court for the Eastern District of North Carolina invalidating six of North Carolina's multimember districts on the ground that those districts had the effect of diluting black votes in violation of Section 2 of the Voting Rights Act of 1965.

### Interest of *Amicus Curiae*

The Governor wishes to make clear to the Court that the highest elected official of the State of North Carolina, and one with extensive knowledge of and experience in North Carolina politics, does not share the views of the State's Attorney General as set forth in appellant's briefs

before the Court. As a former three-term Mecklenburg County Commissioner (1966-1972), during which time he was elected Commission Chairman and served as President of the North Carolina Association of County Commissioners; a six-term Congressman (1972-1984) from the 9th Congressional District, encompassing Iredell, Lincoln, Mecklenburg and part of Yadkin counties; and, since his election in November 1984, the Chief Executive Officer of the State, he believes that his views will be of special value to the Court.

The Governor's interest is two-fold. As a member of a minority political party in North Carolina (only the second Republican governor in this century), he is well aware of the disadvantages North Carolina's multimember voting system creates for *any* minority group where the majority group tends to vote on the basis of criteria other than the particular candidate's merits. As the representative of all of the people of the State, he is keenly aware of the need to eliminate as quickly as practicable the vestiges of past discrimination and to bring into the political life of the State all of its citizens without maintaining or erecting artificial barriers to full participation of any group. To the extent that multimember districts create such barriers, and the Governor agrees fully with the District Court that in the districts at issue (if not the entire State) they do, they should be stricken down.

### Argument

We eschew the opportunity to enter the debate over whether the "clearly erroneous" standard governs this Court's review because of the Governor's view that, far from "clearly erroneous", the District Court's essential findings were clearly correct. There can be little question that multimember districts in North Carolina dilute the effect of black votes wherever there are smaller included

districts with clear black majorities. The election of some blacks to the State legislature does not detract from the simple, but obvious, truth that, although in some circumstances the artificial barrier of multimember districts can be overcome, the barrier surely exists.

As the record below amply demonstrates, North Carolina's multimember districts create additional difficulties for blacks seeking to participate fully in the State's political process. The significantly higher cost of campaigning in the larger multimember districts (Pl.Ex. 20; R. 130-31, 133), coupled with the greater difficulty black candidates face in raising campaign funds (R. 437, 443, 468), act as further deterrents on black candidacies. Thus, the significant economic disparity between whites and blacks in the State exacerbates the discriminatory impact of multimember districting.

This administration is committed to opening the political process to all North Carolinians. In making appointments to State Boards and Commissions, the Governor is seeking to attract qualified citizens regardless of race, age, sex, political party or geography. He has already made, and will continue to make, significant progress in broadening the base from which these executive appointments are made.

Such progress necessarily will be of limited impact, however, if the State legislature (with its unusual powers)\* continues to be chosen by a process which is, after all, the remnant of an earlier time when the government in North Carolina was conducted solely by white male Democrats. Black citizens of North Carolina, because of their economic disadvantage, feel the discriminatory impact of multimember districting even more than other minorities in the political process. The Court is thus respectfully urged to strike down this anachronistic system at least in those dis-

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\* North Carolina is the only state where the legislature alone can enact legislation; there is no provision for any gubernatorial veto.



tricts where the District Court found ample proof of its discriminatory impact.

### Conclusion

The judgment of the District Court should be affirmed.

Respectfully submitted,

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